Supreme Court of the United States

October Term, 1959

No. [illegible]

MICHAEL VINCENT GEAGAN ET. AL.S.

PETITIONERS,

COMMONWEALTH OF MASSACHUSETTS,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

PAUL F. SMITH
MANUEL KATZ
209 Washington Street
Boston 8, Massachusetts
Attorneys for Petitioners
Pino, McGinnis and Costa

ROBERT DEGIACOMO
10 State Street
Boston, Massachusetts
Attorney for Petitioner Maffie

LAWRENCE O'DONNELL
418 Adams Street
Dorchester, Massachusetts
Attorney for Petitioners
Geagan, Richardson and Faherty

HENRY SONTAG
31 Milk Street
Boston, Massachusetts
Attorney for Petitioner Baker

Blanchard Printing Company, Boston, Mass. — Law Printers

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No.

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PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Petitioners, Michael Vincent Geagan, Joseph F. McGinnis, James Ignatius Faherty, Anthony Pino, Thomas Francis Richardson, John Adolph Maffie, Vincent James Costa, and Henry Baker, by their attorneys, severally pray that a writ of certiorari issue to review the judgment entered in 13 cases on July 1, 1959, by the Supreme Judicial Court of Massachusetts.[1]

[1] On July 1, 1959, the Supreme Judicial Court of Massachusetts sent to the Superior Court for Suffolk County, Massachusetts, an order incorporated in a rescript affirming the judgments of the latter court in 13 cases. Appendix A hereto, *infra*, p. 138. It is the review of that order which is sought. Cf. *Cole* v. *Violette*, 319 U.S. 581, 63 S. Ct. 1204.

Opinion Below

The opinion of the court below, printed in Appendix A hereto, *infra*, p. 106, is reported in 1959 Mass. Adv. Sh. 1107, 159 N.E.2d 870.

Jurisdiction

The judgment of the court below was entered on July 1, 1959, and is also printed in Appendix A hereto, *infra*, p. 138. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1257. (3) since petitioners had specially set up and claimed certain rights under the constitution of the United States.

Questions Presented

I. Whether there has been a violation by Massachusetts of petitioners' federal constitutional right to a fair and impartial grand jury, where state and federal enforcement officials, acting collectively and individually, issued, caused and stimulated massive, prejudicial pre-indictment publicity, calculated and tending to convince the grand jury returning the indictments of petitioners' guilt; and if so, whether petitioners' convictions should be set aside and the indictments quashed or abated.

II. Whether there has been a violation by Massachusetts of petitioners' federal constitutional right to a fair, impartial and at the same time, speedy trial where state and federal enforcement officials, acting collectively and individually, issued, caused and stimulated massive, prejudicial pre-trial publicity, calculated and tending to convince the petit jury of petitioners' guilt; and if so, whether petitioners' convictions should be set aside and the proceedings dismissed.

III. Whether, because of massive, sustained, prejudicial pre-trial publicity, the failure on the part of the trial judge, sua sponte, to continue the case for trial deprived petitioners of their federal constitutional right to a fair and impartial trial, especially where the trial judge ruled that any request for a continuance by petitioners would constitute a waiver of their constitutional right to a speedy trial; and if so, whether petitioners' convictions should be set aside.

IV. Whether, in view of massive, sustained, prejudicial pre-trial publicity, the refusal by the trial judge to question prospective jurors searchingly about their prejudices, or to permit petitioners to conduct a voir dire, deprived petitioners of their federal constitutional right to a fair and impartial trial, especially where petitioners had contended and offered to prove that all of the prospective jurors had been prejudiced; and if so, whether petitioners' convictions should be set aside.

Constitutional Provision Involved

Section 1 of the fourteenth amendment to the constitution of the United States reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The eight petitioners were convicted in the Superior Court for Suffolk County,[2] Massachusetts, of various offenses arising out of the $1,219,000 so-called Brink's robbery which took place in Boston, Massachusetts, on January 17, 1950. Each of the petitioners was given a life sentence, a sentence of eight to ten years to be served concurrently with the life sentence, and a two year sentence to be served on and after the life sentence.[3]

At some time on or before January 11, 1956, the District Attorney for Suffolk County, Garrett H. Byrne, conferred with officials of the United States Department of Justice with reference to the preparation of a proposed Department of Justice press release, with respect to the application for federal complaints against petitioners, about the question of whether the Commonwealth of Massachusetts or the United States Government would prosecute petitioners, and concerning the continuance of close cooperation between state and federal enforcement officials. (R. 19-20.[4])

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[2] The transcript of record in this case consists of two volumes entitled *Summary of Record—Assignment of Errors*, hereinafter called "R."; fifty-five volumes of the transcript of the evidence and other proceedings in the Superior Court, hereinafter called "Tr."; five volumes of news articles which were introduced in evidence in the Superior Court in connection with petitioners' constitutional claims and were there marked exhibits A, B, C, D, and E, hereinafter respectively "Exs. A, B, C, D, and E"; and the proceedings in the Supreme Judicial Court of Massachusetts.

[3] Petitioner McGinnis received eight concurrent life sentences, sentences of not less than two and a half nor more than three years and of not less than eight nor more than ten years, which were to be served concurrently with one of his life sentences, and a two year sentence to be served on and after his life sentences.

[4] As will be shown, petitioners filed special pleadings to the indictments which were supported by affidavits (R. 19-47, 82-83) and literally hundreds of news articles (Exs. A-E). The trial judge, in passing upon the constitutional questions raised by those special pleadings not only assumed the truth of the allegations thereof and of the contents of the affidavits, but also said, while speaking about Exs. A,

At that time the United States Department of Justice and the District Attorney for Suffolk County knew that the offences for which federal complaints were to be filed with the United States Commissioner had been outlawed by the applicable Federal Statute of Limitations.[5] (R. 19.)

On January 11, 1956, despite such knowledge, FBI agents appeared before the United States Commissioner in Boston and made three complaints charging the eight petitioners and Joseph J. "Specs" O'Keefe, Stanley A. Gusciora and Joseph S. Banfield with robbing employees of Brink's of property and money belonging to the Federal Reserve Bank, with conspiring to rob Brink's of property and money belonging to the Federal Reserve Bank, and with conspiring to receive property and money belonging to the Federal Reserve Bank and money of the Veterans' Administration, and two additional complaints charging petitioner McGinnis with receiving money belonging to the Federal Reserve Bank and with receiving money belonging to the Veterans' Administration. (R. 30-38.) At the time, the Department of Justice never intended to prosecute those federal complaints but sought the federal warrants merely as a make-weight for the news release which would be issued simul-

B, and C: "Without prejudice, subject to change, the court is of the opinion right now that whatever was published in the paper will be taken as true unless the District Attorney representing the Commonwealth makes an issue of any particular statement." (Tr. 128.) The District Attorney never made an issue of any particular statement and the trial judge never changed his position. Moreover, the Commonwealth conceded on page 9 of the brief which it filed in the court below that its motion to dismiss petitioners' special pleadings could "be treated as recognizing an issue as though raised by a demurrer or *venus*".

[5] Even Attorney General Brownell said that the federal statute of limitations had run on the substantive offenses, that petitioners could only be prosecuted in the federal courts for a continuing conspiracy for which the maximum punishment was only five years, and that as a result petitioners would be prosecuted in Massachusetts where they could get life imprisonment on the substantive charges. (Ex. A 5, 15, 18, 47, 154A.)

taneously with the arrest of petitioners under those warrants.[6] (R. 20.)

Warrants of arrest were obtained from the United States Commissioner and at different times during the morning of January 12, 1956, petitioners Pino, Costa, McGinnis, Maffie, Geagan and Baker were arrested.[7] Simultaneous with their arrest the Department of Justice news release (R. 39-47) was issued to the press. (R. 20.)

The release which was prefaced in bold caps, "FOR IMMEDIATE RELEASE", stated that the "Department of Justice announced that intensive investigation by the FBI for the past six years has resulted in the solution of the one million dollar Brink's robbery"; that "of the eleven members of the gang responsible for the robbery, the FBI this morning (January 12, 1956) arrested six" on warrants issued by United States Commissioner at Boston; that "J. Edgar Hoover, Director of the FBI, identified the six arrested persons as Henry Baker, James Vincent Costa, Michael Vincent Geagan, Adolph Maffie, Joseph McGinnis and Anthony Pino", the two gang members now in prison as O'Keefe and Gusciora, and the deceased member as Banfield. The release told that "all of the persons named, except Faherty were among the many witnesses who appeared before the federal grand jury which held hearings in Boston between November 25, 1952 and January 9, 1953, in regard to the Brink's robbery"; and proceeded in considerable detail to outline how the gang had systematically planned and studied for the

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[6] On January 19, 1956, just eight days after the federal complaints were made, the United States Attorney for the District of Massachusetts applied to the United States District Court for leave to dismiss those federal complaints because "difficult legal problems involving the statute of limitations (18 U.S.C. s. 3282 as amended) will arise in the prosecution of the crime." (R. 23.)

[7] Petitioners Faherty and Richardson were not apprehended until May 16, 1956. (Tr. 2884-2890.)

robbery, how the robbery was carefully executed, and how some of the members of the gang made a preliminary effort to count the loot that same evening, "but quickly dispersed to establish alibis for themselves".[8] The statement pointed out that all of the facts in the FBI's possession had been turned over to District Attorney Garrett H. Byrne, that the question of ultimate prosecution was a matter to be worked out between United States Attorney Julian and District Attorney Byrne and that the FBI would continue to make its investigative facilities available to assist prosecutive officers to the fullest extent. The release concluded with the statement in bold caps, "BACKGROUND DATA ON THOSE ARRESTED IS ATTACHED". Annexed to the release were the police and criminal records of each of those arrested. (R. 39-47.)

The effect of the announcement by the Department of Justice, as well might have been anticipated by District Attorney Byrne and officials of the Department of Justice, was sensational. Its substance was broadcast throughout the United States by all of the news services and by radio and television. Its impact in Massachusetts and in Suffolk County was of particular intensity. Because of the overwhelming prestige enjoyed by J. Edgar Hoover, his pronouncement that the case was solved was accepted by the press and public as establishing beyond any doubt the guilt of those petitioners. The newspapers all carried stories telling why O'Keefe had confessed, the contents of his confession, and linking petitioner McGinnis with the murder of one Carleton M. O'Brien of Rhode Island, petitioner Pino with the escape of Elmer "TNgger" Burke, a notorious criminal who had just been sentenced to be electrocuted in New York for murder, the Brink's robbery with the death of George D. O'Brien, acquitted in the

[8] Seven of the eight petitioners actually had alibi witnesses testify in their behalf at the trial.

much publicized Danvers, Massachusetts, larceny, the Brink's robbery with the disappearance of John Carlson, a South End bookie who had reportedly helped O'Keefe when machine-gunned by "Trigger" Burke.[9] The newspapers in bold and sensational headlines reported statements made by the District Attorney and his assistants discussing and characterizing in detail the testimony which O'Keefe, who was and had been held incommunicado, would give before the Suffolk County grand jury. (R. 21-25.)

Below are set forth samples or summaries of, or excerpts from, what appeared in the newspapers distributed between January 12, 1956, at about 2 p.m., when the FBI announcement was released, and January 13, 1956, at about 11:30 a.m., when a Suffolk County grand jury was first convened to consider evidence relating to the robbery. (R. 24.)

A few samples of the sensational headlines, without regard to the number of inches and columns occupied by such headlines, are

"BRINKS HOLD-UP SOLVED" (Ex. A, pp. 7-8.)

"EXTRA, EXTRA, BRINKS HOLD-UP SOLVED" (Ex. A, p. 9.)

"BRINKS ROBBERY SOLVED AS SPEC'S O'KEEFE TALKS" (Ex. A, p. 12.)

"O'KEEFE SPILLS BRINKS HOLD-UP DETAILS" (Ex. A, p. 81.)

"SPEC'S TELLS ON GANG" (Ex. A, p. 47.)

"BRINKS CASE SOLVED, O'KEEFE KEY FBI: THIS IS HOW IT HAPPENED" (Ex. A, pp. 23, 28.)

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[9] At no time during the trial did the government even attempt to offer any evidence linking petitioner McGinnis with the murder of Carleton M. O'Brien, petitioner Pino with the escape of Elmer "Trigger" Burke, or the Brink's robbery with the death of George D. O'Brien or with the disappearance of John Carlson.

"BIG GUARD FOR SPECS AS BRINKS KEY" (Ex. A, p. 33.)

Several samples of the equally sensational sub-headlines, without regard to the inches and columns occupied by them, are

"Million Dollar Loot Spent By Gang—Not a Cent Recovered" (Ex. A, p. 13.)

"Brinks Robbery Solved—O'Keefe Talks" (Ex. A, p. 13.)

"Officials Say O'Keefe is 'Very Cooperative'" (Ex. A, p. 16.)

"6 Bandits Put in Jail Here" (Ex. A, p. 18.)

"Brinks Case Broken by F.B.I. with Arrest of Six Tied to $1,218,000 Cash Robbery" (Ex. A, p. 47.)

Summaries of some of the stories, which appeared prior to the convening of the Suffolk County grand jury, follow.

Under those or similar headlines, there were stories that O'Keefe told FBI agents the "inside" story of the fabulous holdup; that O'Keefe not only named himself as one of the Brink's bandits but "laid out the underworld's greatest secret in such detail that those checking the story could not find a single act that went unsubstantiated";[19] that this "enabled the FBI to electrify the nation with the announcement of the solution of the fantastic robbery"; that United States District Attorney Julian worked incessantly for three days and three nights "before the sensational announcement could be made yesterday by J. Edgar Hoover that the 'Brink's Robbery is Solved'"; that Julian had "announced that extra security measures for all who might be hurt as a result of the solution, had been taken"; that McGinnis was named by O'Keefe

[19] O'Keefe was being held incommunicado. His contact with the press could only have been through federal and state enforcement officials.

as a leader in the formulation of the robbery; that an FBI spokesman in Washington said, "None of those rounded up went off on a wild toot—not a one of them. But those boys can spend money awfully fast";[11] that Byrne and his staff and FBI agents and Boston Police grilled O'Keefe for hours and they said O'Keefe was "very cooperative"; that at 8:45 p.m. on January 12th Byrne said, "O'Keefe will be a principal witness before the Grand Jury tomorrow"; that "a police official" said (on the evening of January 12th), "'Spees will have no chance to talk to anybody unless it's to us. He is a very special person and we intend to treat him as such'"; that United States Attorney General Brownell said that the case would be given to the state because punishment would be heavier. (Ex. A, pp. 12, 13, 15, 16, 102.)

There were also stories that District Attorney Byrne said, "O'Keefe was the trump that the Commonwealth was holding last night. He was singing long and loud"; "that Spees is going through all the way"; that Assistant District Attorney John McAuliffe attributed O'Keefe's talking to "the falling out among thieves"; that McAuliffe said, "O'Keefe felt he got a raw deal from the others and talked"; that McAuliffe said Spees gave a "detailed account of how the robbery was planned and carried out"; that McAuliffe called the story "fantastic to put it mildly"; that at 7:30 p.m. (January 12th) District Attorney Byrne disclosed that presentments were being drafted by clerks and police stenographers naming all suspects for conspiracy, armed robbery, possession of firearms;[12] that the United States Grand Jury had failed to return indictments because they could not use wire and tape recorded testimony but that the state procedure is more liberal with reference to

[11] At no time during the trial did the government even attempt to prove that petitioners spent "money awfully fast".

[12] Even before the grand jury was convened.

evidence;[13] that the FBI "having now released its solution the next step will be taken in the State Courts"; that a series of mysteries plagued the Brink's case; that the homicidal deaths of Carleton M. O'Brien and George D. O'Brien and the disappearance of John Carlson were connected to the Brink's case;* that District Attorney Byrne said: "I believe Carlson is dead. Carlson disappeared a short time after he was up here to see us;"* (Ex. A, pp. 47, 50, 51, 53, 58, 60, 61, 64, 67, 70.)*

Also reported were stories that an investigator attributed O'Keefe's talking to "the old story of one of the mob getting peeved"; that O'Keefe "griped" that he never got his fair share of the loot; that O'Keefe claimed that the Pennsylvania Police (who arrested him in June, 1950) were tipped off that guns were in his car; that petitioners were "dangerous and resourceful men"; that the FBI believed the gang guilty from the start; that the "G men were not dealing with 'neophytes' but with hardened criminals";* that there was "murder, jail delivery, silence in Brink wake";* that the Danvers robbery (sic) opened up a new cross current in the case;* that someone imported "Killer" Burke from New York to wipe out O'Keefe;* that O'Keefe had "talked like a bird"; that an investigator said he understood O'Keefe had never received his due from the fellow members of the Brink gang and wanted revenge now that the statute of limitations would apply in a few hours; that Byrne denied that any "deal" had been made for O'Keefe's cooperation; that O'Keefe's statement was described by Byrne as "fantastic". (Ex. A, pp. 18, 19, 20A, 25A, 28, 30A.)*

Under a headline, "Brink's Timetable", the deaths of

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[13] At no time during the trial was there any indication that the government had used a wire tap.

* There was no such evidence offered by the government or admitted at the trial.

Carleton M. O'Brien and George D. O'Brien, and the disappearance of John Carlson, were listed together with the dates on which those events occurred and all of those events were linked to the Brink's robbery.* (Ex. A, pp. 18, 19, 20A, 25A, 28, 30A.)

Still another paper under a headline, "LAW OFFICIALS ELATED", quoted various Massachusetts officials:

Andrew J. Trodden, Assistant Attorney General of Massachusetts, said, "If this thing ends in convictions and as a result most of these men are put away, it will cut down a great deal of criminal activity in this field. The fact that this big robbery was not solved has almost been a feather in the cap of the underworld. The assurance that this thing has now been broken is bound to give the whole community a lift."

Captain Crescio, chief of Massachusetts State Police Detectives, said, "Anything like this has a tendency to make the little hoodlum worry about his possibilities of getting away with a crime. It is certain to have a great effect on law enforcement in general."

Captain Joseph McEneney, public information officer of the Massachusetts State Police said, "This is quite a feather in the cap of law enforcement. It is bound to have a considerable effect on criminals, particularly on the young people among them, and perhaps in a lesser degree on the hardened types. They have said for some time now that the police can't solve anything. There has been a feeling close to contempt for law enforcement. This shows them that they are wrong. Possibly many of these potential or actual criminals will now think twice. It is sure to sober them up any way."

John Coughlin, Chairman of the Massachusetts Youth Service Board said, "There is certain to be a chain reaction

* There was no such evidence offered by the government or admitted at the trial.

to this Brink's robbery solution not only among young people but also among adults. When people find out they can get away with a law violation even adults will tend to say what's the use of going straight . . . This Brink's robbery has been publicized in the newspapers and even in the movies. It must have glamorized and glorified these criminals in the minds of many. Certainly this has been the major crime of our time, planned, rehearsed and executed carefully. For solving it we congratulate law enforcement officials and everybody who has had a part in bringing this case to justice."

Thomas J. McArdle, counsel for the Massachusetts Crime Commission, agreed that the solution of the Brink's crime would tend to have a good effect on law enforcement and community morale in general. (Ex. A, p. 102.)

The Mayor of the City of Boston was quoted in many newspapers, "I think the FBI should be highly commended for its tenacity and perseverance in solving the case. At long last this robbery has been solved as I always thought it would be. It is wonderful news." (Ex. A, pp. 47, 53, 60, 61, 68.)

Samples of some of the editorials which appeared prior to the meeting of the Suffolk County Grand Jury are:

"BENEATH THE MASKS

"Announcement of the *solution of the Brink's robbery* only five days before the expiration of the old state statute of limitations does not of course guarantee *conviction of the men who staged the largest cash bank in American criminal history.* That is the next step to be fought in the courts.

"The stain of the Brink's robbery is still not erased. It will be a long time before this crime, a complete triumph for the underworld is forgotten, and before the reputation of Boston for law and order with which it is coupled is vindicated."

"Stern and courageous prosecution lies ahead. *These figures* emerging from behind the Halloween masks that they wore on the night of Jan. 17, 1950, *are* not heroic figures, but *desperate and lawless men.* And that is the dreadful aspect of the Brink's robbery—*that a few punks could for almost six years remain at large unpunished for the world's greatest robbery.*" (Ex. A, p. 12.)

"THANKS, MR. HOOVER

"The announcement *of the solution* is a great relief to Boston. The case gave the city more publicity than anything since the Boston Tea Party. But it was the wrong kind of publicity.

"The FBI has done Boston and the nation another fine service. Boston can now be forgotten as the 'home of the greatest unsolved crime in the history of the country.' Thanks, Mr. Hoover". (Ex. A, p. 18.)

"THE BRINK'S BAG

"All of us owe a resounding voice of thanks to the FBI for cracking the Brink's case.

"The successful action of J. Edgar Hoover and his organization has removed some of the shame and stigma that had been created by the crime.

"If remains, of course, the record-breaking robbery. But it will be better to have the record-breaking robbery marked 'Solved' than to have it sit on the books for year after year as a testimonial to police failure.

"While the Brink's job stayed unsolved, it remained a challenge to a gamut of characters from corn-loving comics to reefer-smokers and imaginative bandits.

"It had become old stuff to refer to Boston as the place where a hooded gang could walk in with empty pockets and stroll out with more than a million dollars. Now,

at least, the retort can be: 'Perhaps, but in the end the FBI gets them all.'

"What of the gang that pulled the fantastic trick? Were they master criminals? Not at all. A well-known hood or two, a little-known hood or two, a couple of seasoned gunmen—in short, about what any cop could expect to find by raiding a gang meeting in a dirty back room.

"Why, then, did it take six years to catch them? Perhaps we'll never know the full story about that. For now, we'll say no more on that angle except that they're caught (most of them) and we're heartily glad.

"And what of their profits? What did they get as their split-up share in the biggest robbery on record? They got six years of glancing over their shoulders, of suspicion, of doubt, of uneasiness. Some of them got a respite in prison. Not one of them got to a station in life any higher or more pleasant than the low spot he occupied on the night of the crime.

"Six years after the crime, six of the men were still in Boston when they were arrested by the FBI. One was dead, two were in prison and two were still on the lam.

"We share the satisfaction of the FBI in seeing the case broken." (Ex. A, p. 46.)

"COLLAPSE OF A CRIME BALLOON

"There are good reasons for Boston's gratification over the Federal Bureau of Investigation's report that the fabulous Brink robbery has been solved.

"For six years the city and Bay State has been embarrassed by the national attention they received as the site of a $1,219,000 cash robbery of an armored car company. A three-pronged investigation by city, state and federal authorities turned up suspects galore but not enough evidence to warrant indictments.

"The fact that all of the accused men lived in the Boston area both before and after the robbery is unsettling to Bostonians, who are told that a crime of such proportions was planned and rehearsed for a year without police detection. Furthermore, the accused men have lived in the area for six years without becoming more than suspects.

"Whether or not the arrests represent a total solution of the crime remains to be seen at the trial. The time limit for prosecution has nearly run out. So the arrests may signify a decision to go ahead with what is known, even if it turns out incomplete.

"The Suffolk County District Attorney's office now has the responsibility of pursuing the case with a vigor equal to that of the FBI. Unfortunately, the federal statute of limitations on the actual crime ran out three years ago.

"Removal from the Boston scene of even a handful of criminals capable of crimes of this magnitude would be cause for gratitude. The Brink's case no longer symbolizes criminal success. It underlines anew the familiar proposition that crime does not pay, regardless of how brazenly it argues for a time that it has.

"Thanks largely to the unflagging determination of the Federal Bureau of Investigation, the air has been let out of the big crime balloon. The audacity of the robbers is overshadowed by the steadily dawning brilliance of detection and law-enforcement." (Ex. A, p. 103.)

"CASE OF MR. B

"The Federal Bureau of Investigation is certain that it has solved the crime which for nearly six years has been the underworld's boldest, mocking challenge of the law.

"If the Brink's robbery is solved, this is perhaps the finest of the FBI's many accomplishments in the field of crime detection. Conviction of the guilty will be a major

blow to gun hoodlums everywhere and a deterrent of equal proportions.

"J. Edgar Hoover's agents never eased up their pressure for the solution of the case that came to be called 'Mr. B'. When active investigation by local authorities sputtered to a standstill, the FBI only increased its efforts.

"In turning the case over to Suffolk County for prosecution, the Department of Justice paid a compliment to District Attorney Byrne and his staff. Mr. Byrne has moved for swift process of law. The accused are entitled to speedy trial and should get it." (Ex. A, pp 117-118.)

From the afternoon of January 12, 1956, until the return of the indictment by the Suffolk County grand jury during the afternoon of January 13, 1956, the press iterated and reiterated the guilt of petitioners, a detailed description of how petitioners had committed the crime, how petitioners were responsible for a number of unsolved murders and the disappearance of a witness, and how generally unsavory petitioners were. This massive, prejudicial publicity was issued and caused by the District Attorney for Suffolk County, his assistants, other officials of the Commonwealth, and officials of the Department of Justice. Such news releases and statements and the wide-spread and sensational publicity given them were "calculated to and did tend to convince . . . the grand jury . . . of the guilt of each of the defendants and to arouse their (the grand jury's) animosity, indignation and prejudice towards and against each of the said defendants". (R. 16.)

During the afternoon of January 13, 1956, a Suffolk County grand jury returned three indictments charging the eight petitioners and O'Keefe, Gusciora and Banfield with armed robbery of Brink's employees, with breaking and entering the Brink's premises in the nighttime with

intent to commit robbery and with conspiring to steal.[14] (R. 1, 352, 427.)

Between the morning of January 13, 1956, and the morning of January 16, 1956, when the same Suffolk County grand jury was again convened, the publicity continued unabated. (R. 16.)

Summaries of, or excerpts from, some of the stories appearing during this period follow:

Under a headline, "EXCLUSIVE: O'KEEFE'S OWN STORY OF BRINK'S CRIME",[14a] there appeared O'Keefe's own story as told to "police officials." He "opened his statement by saying how the gang had planned the Brink's robbery for more than a year and a half. The plan was 'to take the Brink organization'. He related how they had 'cased' what he called 'the old joint' on Federal Street. He said they had formed plans to 'grab a safe there' but ultimately abandoned the project on the grounds it was 'too hot'. O'Keefe told how the building was under 'almost constant surveillance by the gang both night and day during their study of the operation. O'Keefe then told D. A. Byrne and others how the Brink plant was watched on numerous nights until after the work there had been ended. Then they knew that the only one present was the watchman. He then told how the gang entered the plant night after night through the garage, . . . 'On the night of the robbery Joseph McGinnis was not 'in' on the actual holdup,' O'Keefe said. 'McGinnis did not 'show' for the

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[14] On that same day, the grand jury returned a three count indictment charging the eight petitioners and O'Keefe, Gusciora and Banfield additionally with confining and putting in fear; and also forty-two indictments containing 140 counts charging petitioner McGinnis with being an accessory either before or after the fact to armed robbery, breaking and entering a building in the nighttime with intent to commit robbery, and to confining and putting in fear. None of these indictments, although still pending, has ever been tried.

[14a] During this time O'Keefe was held incommunicado.

raid, we met him later,' O'Keefe explained. Seven of us including myself did the actual job inside. One man was outside in a Ford and two others were in the truck that was used. O'Keefe said the truck was brought along to park, . . . O'Keefe told how the men entered the money gate. 'We had keys for everything,' said O'Keefe. He said the money was put in 'burlap hampers' and those were carried down and loaded into the truck. They drove directly to a Roxbury house he said. He named the house . . . O'Keefe said another truck was used too by McGinnis and Banfield to take the 'dough' to another point. He said he did not know the whereabouts of that second place, . . . He said the original plan the night the money was counted called for the money to be divided with each receiving one hundred thousand dollars plus. O'Keefe said when he got his money from McGinnis 'he felt he had been gypped of quite a few grand.' He beefed at the time he said. O'Keefe said he turned his end over to Adelph Jazz Maffie to hold for him. 'I got gypped I never got it, it was the last I ever saw of it,' said O'Keefe. O'Keefe said he continued to beef from time to time both for his dough and for the shortage. He admitted being shot at twice in Dorchester.* I imagine it was because I was beefing, he said.* At this point in O'Keefe's story the talk was directed to the time he was ambushed by Elmer 'Trigger' Burke. 'He was not in on the job,' said O'Keefe, 'in any way'. O'Keefe indicated that Burke was brought in 'to take care of O'Keefe for his beefing'.* At this point O'Keefe continued, 'there was no inside connection, we had keys to every lock in the joint. We had a complete lay-out and we didn't need an inside man.'' (Ex. A, p. 40.)

Under a bold-faced heading, ''EXTRA GUARDS SET TO BLOCK JAIL BREAK'', there appeared a story that

* There was no such evidence offered by the government or admitted at the trial.

petitioners were expected to attempt to break out of the Charles Street Jail where they were then being confined." (Ex. A, pp. 33, 37.)

A spokesman for the district attorney's office was quoted as saying that "Specs talked freely. The whopping sheaf of indictments confirmed this." (Ex. A, p. 45.)

Under the caption, "O'KEEFE THINKS BURKE KILLED TWO MEN LINKED TO BRINK'S HOLDUP CASE, TELLS BYRNE TWO ATTEMPTS MADE ON HIS OWN LIFE", O'Keefe was quoted as having told the district attorney and police officials that a New York mob was told to hire "Trigger" Burke and send him here to knock off O'Keefe;* that Burke killed Morris (Whitey) Hurwitz of Brookline;* that two attempts had been made to kill him (O'Keefe);* that "the official said that not only was O'Keefe talking, but his story was so detailed that it could have come from one who was on the inside of the Brink's job both in its planning and its execution;" that O'Keefe was bitter at the other members of the gang and that was "what furnished the lyrics and music for the song Specs O'Keefe sang today." (Ex. A, pp. 61, 68.)

Under a headline, "O'KEEFE TALKS ELEVEN INDICTED IN BRINK'S CASE", there was a story that five witnesses headed by O'Keefe were before the grand jury; that "O'Keefe said that the robbery had been planned for a year and a half . . . ; that O'Keefe had decided to talk, according to officials, because he hadn't received his share of the loot; that O'Keefe had said that in June of 1954 a machine gun had been turned on him by "Trigger" Burke;* and that Rhode Island police were planning to question some of the jailed Brink's suspects in renewed attempts to solve the 1952 slaying of Carleton O'Brien." (Ex. A, p. 101.)

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* There was no such evidence offered by the government or admitted at the trial.

Under a headline, "O'KEEFE'S FEAR FOR HIS LIFE CONVINCED HIM TO TELL ALL", it was reported that a gangland message sent through the grapevine to the effect that "we'll get you good when you get out" convinced O'Keefe to tell the FBI all;* and that O'Keefe was also quoted as saying that endless planning and great detail went into the execution of the robbery and "we didn't overlook a bit". (Ex. A, p. 105.)

Under a headline, "GANG KILLINGS TIED TO BRINKS", and a sub-headline, "Cops Reopen Two Hub Cases, Third In Rhode Island," there appeared a story summarizing the homicidal deaths of one "Whitey" Hurwitz, John Carlson, James Bratsos and Carlton O'Brien and stating that "authorities" have new evidence indicating that there were direct links between the Brinks case and several of the unsolved killings.* Pictures of the deceased persons were carried underneath which appeared a caption "Did they die because they knew too much?" (Ex. A, p. 113.)

Under a headline "KEY BRINKS OFFICIAL IS THREATENED", appeared a story intimating that an unnamed official had been threatened.* (Ex. A, p. 114.)

Under a headline, "SECOND TALKER MAY JOIN SPECS", there appeared a story that another Brink's suspect was ready to crack and that "last night the confident prosecutor (District Attorney Byrne) did not deny that Specs will be joined by another of the suspects in turning state's evidence."* (Ex. A, p. 108.)

Under a front page headline, "SAY GUSCIORA TALKING", and a sub-headline, "Convict Joins O'Keefe in Telling All," there appeared a story to the effect that according to one official, Gusciora, one of the defendants, was ready to talk.* (Ex. A, p. 110.)

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* There was no such evidence offered by the government or admitted at the trial.

Under a headline, "THREATENS BRINKS MAN DON'T TALK A ROUGH VOICE TELLS MANAGER", there appeared a story that "the underworld was striking back", that at least three and possibly five murders had been linked by investigators to the Brink's case; that O'Keefe's story told yesterday had caused the reopening probes of three and possibly five murders; that such disappearances and murders have given officials reason enough for mounting heavy guard over eight Brinks suspects and others involved in the case." (Ex. A, p. 109.)

Under a headline, "THREATEN BRINKS WITNESS", there appeared a story that "an important witness for the state in the Brinks robbery has been warned not to talk," police revealed today." (Ex. A, p. 121; 123.)

Under a headline, "BRINKS CASE CALLED AIRTIGHT, U.S. JURY TO SIT, ELEVEN INDICTED IN SUFFOLK," and a sub-headline "McGinnis Alibi Mystery Ended", appeared a story to the effect that "the FBI and District Attorney Byrne moved swiftly and decisively yesterday and 'sewed up' the case against the Brinks bandits. They had full admission of participation in the robbery by one of the masked men, O'Keefe. They developed evidence corroborating O'Keefe". The story continued that O'Keefe had said that the reason he went before the grand jury was, "I want to straighten things out with my family because twice I escaped death from the gang's guns;"* that Lieutenant Crowly of the Boston Police Department had been "set up" to provide an alibi for McGinnis who, according to O'Keefe, master minded and pulled the strings for the robbery; and that O'Keefe said he talked to save his own life." (Ex. A, p. 111.)

Under a headline, "BOMB HUNTED NEAR SPEC'S CELL," and another headline, "REPORT DYNAMITE PLOT TO SEAL O'KEEFE'S LIPS", stories appeared to

* There was no such evidence offered by the government or admitted at the trial.

the effect that anonymous telephone calls had been received telling of the proposed bombing of O'Keefe's jail cell in order to seal his lips." (Ex. A, pp. 134, 135, 139, 145.)

Included within one of the foregoing stories were "FBI disclosures" of a new Brink's witness who reportedly supplied them with corroborating evidence and of a purported telephone threat directed to a victim of the robbery who had also testified before the grand jury," and reports from "top investigators" that others of the Brink's suspects might follow the lead of O'Keefe and turn state's evidence." (Ex. A, p. 145.)

Under a headline, "LINK BRINK GANG TO BURKE BREAK," there was a story linking Elmer "Trigger" Burke's escape from the Charles Street Jail with petitioners." (Ex. A, p. 164.)

Under a headline, "BRINKS DANVERS LINK BARED", there appeared a story that a new disclosure and other important developments together with information that the FBI has, "definitely established links between the Danvers robbery and the Brinks theft." (Ex. A, p. 148.)

Under a headline, "MAN SLAIN IN GEORGETOWN, BRINKS CONNECTION IS WEIGHED", there appeared a story about the slaying of a man in Georgetown and the possible link between that murder and the Brinks case." (Ex. A, p. 160.)

The prejudicial publicity, of which the foregoing summaries and excerpts are only samples of what appeared in the press prior to the convening of the same Suffolk County grand jury on January 16, 1956, was issued and caused by the district attorney, his assistants, other state officials and officials of the Department of Justice. Such

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* There was no such evidence offered by the government or admitted at the trial.

news releases and statements, and the wide-spread and sensational publicity given them, "were calculated to and did tend to convince . . . the grand jury . . . of the guilt of each of the defendants and to arouse their animosity, indignation and prejudice towards and against each of said defendants. (R. 16.)

On January 16, 1956, the same grand jury returned ten indictments charging petitioner McGinnis with receiving the Brink's loot, with being an accessory before the fact to the armed robbery, and with being an accessory before the fact to the breaking and entering of the Brink's premises in the nighttime with intent to commit robbery.[15] (R. 543, 600, 632, 692.)

That afternoon petitioners McGinnis, Pino, Costa, Maffie, Geagan and Baker were arraigned on the three indictments returned on January 13, 1956.[16] Each of the said petitioners remained mute. A plea of not guilty was entered by direction of the court. Each was ordered to recognize in the sum of $200,000 with double sureties. Because of an inability to furnish that amount of bail each of the said petitioners was committed to jail where he remained until convicted, at which time he was committed to the Massachusetts Correctional Institution to commence serving his sentences. (R. 5; Tr. 2, 3, 10.)

The prejudicial publicity continued unabated. (R. 16, 18.)

Some summaries of, or excerpts from, what appeared

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[15] On that same day, the grand jury returned thirty-two more indictments containing 100 counts charging petitioner McGinnis with various accessory offenses. These indictments, although still pending, have never been tried. On March 8, 1956, the grand jury returned seventy more indictments containing 210 counts against petitioner Pino charging him as an accessory to various offenses connected with the Brink's robbery. He has never been tried on any of those indictments which are still pending.

[16] Petitioner McGinnis was also arraigned on an accessory indictment on which he has never been tried.

in the press between January 16, 1956, and February 13, 1956, follow:

One story stated that authorities suspected that the Brink's defendants "after importing Burke to ambush O'Keefe, had to spring him from jail to make sure he didn't talk."* (Ex. A, p. 195.)

In a story dealing with the arraignment of petitioners, it was said that petitioners "were given all the precautions normally accorded dangerous criminals on the strength of their record."* (Ex. A, p. 183.)

There was a story that "new evidence in the $681,000 Danvers armored car robbery linking it with the Brinks case," will be presented to a special grand jury, Department of Justice officials said today." (Ex. A, p. 179.)

Under a headline, "O'KEEFE KIN GUARDED BY DAY, NIGHT," there was a story that members of O'Keefe's family were under guard and that "several government officials have announced they were convinced there is a definite link between the two robberies (Brinks and Danvers)".* (Ex. A, p. 206.)

Under a headline, "TIE FIVE MURDERS TO BRINKS CASE," it was reported that "Suffolk County investigators revealed that one tip was to the effect that missing bodies are buried under clam flats outside of Boston, and that the Brinks robbery investigation, now largely a hunt for loot, may extend to a search for bodies."* (Ex. A, p. 213.)

Under a headline, "SECOND BRINK ASKS DEAL TO TALK," there was a story that "investigators" had stated that "a second member of the Brinks robbery gang has indicated a willingness to talk, provided he can make a deal with authorities for protection to himself and family and a light prison sentence;" and that "we expect to get

* There was no such evidence offered by the government or admitted at the trial.

the man's statement very soon to back up completely the story of the planning and actual robbery as told to us by O'Keefe.'" (Ex. A, p. 217.)

Under a headline, "O'KEEFE GIVES NEW LEAD ON SOME BRINKS CASH", there was a story that O'Keefe had spent an hour in conference with District Attorney Byrne and detectives; that Byrne said, "We are just clearing up some details in preparation for the prosecution;" and that "officials" said, "O'Keefe has not only furnished enough information to break the Brink's case, but has given new leads to the solution of the Danvers armored car theft."* (Ex. A, p. 223.)

District Attorney Byrne was quoted as saying, "So far, everything O'Keefe's told us has been checked and found to be accurate." (Ex. A, p. 217.)

Under a headline, "ESCAPE ROUTE FROM BRINKS JOB TRACED", it was reported by "investigators from District Attorney Byrne's office" that O'Keefe had spent two successive days with the FBI and Boston police attached to Byrne's office going over every detail of the planning, trial runs and the actual robbery." (Ex. A, p. 233.)

Under a headline, "HUB POLICE NOW GUARD TWELVE OF THE BRINKS WITNESSES", "local officials" said that these witnesses would "sew up the case against the nine defendants. Their stories will supplement those of O'Keefe's." (Ex. A, p. 233.)

Under a headline, "PINO SHIFT FOILS ESCAPE PLOT", there appeared a story that "gangland had plotted a repetition of the bold delivery of Burke,"* and that Byrne had conferred with Corrections Commissioner Oswald and arranged for Pino to be removed to a jail fifty miles away under heavy guard. (Ex. B, pp. 253, 254.)

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* There was no such evidence offered by the government or admitted at the trial.

Under a headline, "BRINKS GANG CHIEF SHIFTED," there appeared a story that "Anthony Pino, named as the mastermind in the Brink's robbery, was suddenly transferred under heavy police guard;" and that District Attorney Byrne said: "It is a security measure. I felt that six men of the type named as members of the Brink gang should not be housed together in one jail." (Ex. B, p. 250.)

Under front page headlines, "FIVE MURDERS LINKED TO BRINKS," "FIVE UNSOLVED SLAYINGS TRACED TO BRINKS ROBBERY," there appeared stories that the Brink's investigation had disclosed that at least five persons who knew too much about the robbery were slain because of the knowledge of the crime according to information given to authorities within the past two days;" that an "official declared that he has good reason to accept the account of the execution of the five men given to him by an unnamed source"; and that the informant had told investigators they "were given the gangland's foolproof, water-cooled, and sand-hardened burial; and that those buried in the sand "should stay buried without any fear that the body will rise from the sand." (Ex. B, pp. 265, 268.)

Under a headline, "O'KEEFE'S SISTER TALKS, BACKS BROTHER'S STORY", there was a story that O'Keefe's sister had been "thoroughly cooperative" and had "provided evidence supporting her brother's participation in the robbery and his accusations against his ten alleged accomplices in the raid."[17] (Ex. B, p. 300.)

Under a headline, "BINK'S LOOT LINKED TO SUICIDE", there was a story to the effect that District

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* There was no such evidence offered by the government or admitted at the trial.

[17] At no time during the trial was any relative of O'Keefe offered as a witness.

Attorney Byrne stated that he had been informed by his investigators that Joseph Venuti, who had just committed suicide, had been entrusted with $100,000 of the loot and that his information was that McGinnis turned over the money to Venuti.* That same story reported that an attractive blonde woman claiming to be an emissary of Elmer "Trigger" Burke, offered to trade information for Burke's life; that investigators had been trying to determine whether she had been authorized to make the offer; that Burke was "conceded" to have known about the Brink's robbery through his having been 'imported' to Boston by members of the gang to wipe out O'Keefe and his close pal Carlson;* and that investigators believed that Burke's testimony could be convincing at the trial of the gang. (Ex. B, p. 329.)

Under a headline, "GAMBLER GOT SLICE OF BRINKS LOOT", there appeared a story that "according to information in the hands of Byrne" approximately $100,000 of the "Brinks loot" was for many years in the possession of Venuti; and that "the district attorney, digging into the whereabouts of the vast sums of money taken at the January 17, 1950 'plunder on Prince Street' had come up with information that the alleged Brink's mastermind, Joseph McGinnis, some time after the robbery, turned over $100,000 to Venuti, a close friend of his." (Ex. B, p. 330.)

Under a headline, "CAPE MAY YIELD BODY, BRINKS CASH", there was a story, attributed to state police and investigators for District Attorney Byrne, to the effect that Carlson's body was buried in sand down the Cape;* that Captain Wilson and Detectives Howland and Barry were driving down the Cape to uncover the bodies; and that O'Keefe had stated that he had been visited in

* There was no such evidence offered by the government or admitted at the trial.

jail just a few days before he "admitted participation" in the robbery and was offered a substantial sum of money to keep quiet." (Ex. B, p. 343.)

In another story, District Attorney Byrne was quoted as saying that Carlson was killed "because O'Keefe had told him details of the Brink's case, details which could have brought about the round-up of the robbers in short order if they had reached official ears;" and Captain Wilson was quoted as saying, "There is some chance we may find some of the Brink's loot in addition to Carlson's burial plot in the sand." (Ex. B, p. 345.)

Under a headline, "BRINKS GANG THOUGHT O'KEEFE WOULDN'T SING", there was a story that O'Keefe had demanded his share of the loot at a meeting in Rhode Island and that his demand had been rejected; that he contacted Pino and "was given the brush-off"; that he told his friend Carlson all about this; that together they teamed up to give members of the Brink's gang a hard time; that they had kidnapped Vincent Costa and demanded $20,000 ransom from Pino;* and that they were paid for the release of Costa. (Ex. B, p. 344.)

There was a story that investigators were probing water filled quarries to determine the fate of one or two Massachusetts men believed to have been slain because they knew too much about the Brink's robbery. (Ex. B, p. 347.)

Under a headline, "FBI GUARDING BLONDE AS BRINK'S LOOT KEY", there was a story that some of the Brink's loot had been traced to Philadelphia;* that full details in connection with this new development in the Brink's robbery case may be made at the trial of the ten Brink's gunmen; that a blonde witness had told special investigators that "a good piece of the Brink's money went to four persons well known in and around Boston, three

* There was no such evidence offered by the government or admitted at the trial.

of them in elective office and one of them a lawyer friend of four of the Brink's bandits, including the three ring leaders of the fantastic holdup.'" (Ex. B, p. 346.)

Under a headline, "BLONDE BRINKS LOOT WITNESS UNDER GUARD" and a sub-heading, "Woman in Protective Custody Saw Batch of Stolen Money Counted," and a headline, "BLONDE SAW BRINK'S LOOT DIVVIED UP", there were stories that a blonde Boston woman would be a witness; that she had seen the stolen money counted and divided; and that she was one of several witnesses that lead FBI director J. Edgar Hoover to announce that the Brink's robbery was solved.* (Ex. B, pp. 353,355.)

Under a headline, "O'KEEFE GIVES UP BRINK LOOT", there appeared a story to the effect that several thousand dollars worth of the Brink's loot had been recovered from a cache where Specs had it for six years;* that O'Keefe told investigators from the District Attorney's office where the loot was hidden and it is now in the possession of the state;* and the prosecution had at least one witness who would testify that Specs told the witness that the money was Brink's loot and revealed where it was concealed.* (Ex. B, p. 368.)

Under a headline, "HUB DOCTOR HID BRINKS CASH", and a subheadline "Bills Found in Bank in Philadelphia", there was a story that "part of the Brink's cash loot has been traced to a strong-box in a Philadelphia bank rented six years ago by a doctor whose medical license has been revoked, was revealed here last night. . . . The doctor, according to information gained by District Attorney Byrne, has been employed by the underworld since losing his license. . . . A considerable portion of O'Keefe's cut reached the doctor's hands according to

* There was no such evidence offered by the government or admitted at the trial.

information gained by District Attorney Byrne and FBI agents.* Four years ago he treated two members of the Brink's robbery gang who were badly beaten up by underworld characters equipped with brass knuckles during the kidnapping of Vincent Costa.* Approximately $15,000 of the Brink's cash was turned over to the doctor before Costa was released after the kidnapping.* John Carlson was the first to lead operators assigned to the Brink's robbery case to the Philadelphia vault.'" (Ex. B, p. 360.)

Under the headlines, "BRINK BANDIT SINGS, BACKS O'KEEFE", "HINT GUSCIORA BREAKS BRINKS SILENCE", "SUSPECT'S STORY MAY BACK SPECS", "POLICE BRINGING REPORT FROM PITTSBURGH PRISON", there appeared a number of stories to the effect that "District Attorney Byrne was awaiting a call from Pennsylvania (where Gusciora was in prison) that would tell him if a second robbery suspect had joined his pal O'Keefe in singing."* (Ex. B, pp. 375, 376, 377, 378, 379.)

Under a headline, "GUSCIORA TO JOIN SPECS IN SONGFEST", there was a story that "Brink's investigators were Boston bound from Pittsburgh today confident they have a principal government witness to corroborate the confession of Specs. 'Mission accomplished' was the terse report made by Captain Wilson to District Attorney Byrne after three days of conference with Gusciora. During the final conversation, telephone communication was established with the office of District Attorney Byrne with O'Keefe present. It is known that Specs talked on the phone and it is believed that he convinced his one-time cell mate and chum that they had both been double-crossed. In addition to his mission accomplished statement, Wilson told Byrne that Gusciora 'has made statements' but that

* There was no such evidence offered by the government or admitted at the trial.

the prosecution right now is admitting nothing, only saying that the Pittsburgh prisoner was 'extremely cooperative' ". (Ex. B, p. 379.)

Life Magazine featured a four page spread. Two of the pages were devoted to pictures of the gang under a heading, "THE ELEVEN MEN WHO STOLE A MILLION". The story was to the effect that "on the basis of O'Keefe's confession, it is possible to tell how the great Brink's robbery was very nearly the perfect crime. . . . Sometime in 1948 McGinnis, a liquor dealer with a long 'sheet' for robbery and narcotics,* began talking with Tony Pino about the possibility of robbing Brinks. Presently from among those whose bad records* made them good prospects, they began recruiting a sizeable corps such a job would require, including dapper Vincent Costa, a good wheel man." (Ex. B, pp. 239, 240.)

Time Magazine featured two stories, one captioned "GANG LEADERS", and exhibiting a picture of Pino, stated, "Late one night last week a sly balding man wearing a sharp gabardine suit in the air of an English butler emerged from the jailer's office . . . . He was Joseph James (Specs) O'Keefe, 47, and he had been talking almost continuously for three days. *Outside on the streets of Boston, and all over the United States, newspapers repeated Specs' story in huge headlines and minute details . . . .*" (Italics supplied.) (Ex. B, p. 243.)

The second Time Magazine story reported under the caption, "CRIME, THE BIG PAY-OFF, WHY O'KEEFE TOLD HIS STORY", stated that "O'Keefe's story was no surprise to the FBI and police. For five years they have been frustratingly familiar with many of the details of the crime and all but one of the eleven gang members (Faherty) have been primary suspects . . . Said one

* There was no such evidence offered by the government or admitted at the trial.

investigator last week, 'We had all the pieces to the puzzle for a long time and knew pretty well how they went together, but we didn't have anything to make them stay until O'Keefe talked.'" (Ex. B, p. 243.)

On February 20, 1956, petitioners McGinnis, Pino, Costa and Maffie, and on February 24, 1956, petitioners Geagan and Baker, each filed to each indictment returned against him on January 13, 1956, a motion to quash, a plea in abatement and a plea in bar; and in support of each an affidavit to which were annexed six exhibits including a copy of the Department of Justice news release and accompanying which was a seventh exhibit consisting of two volumes of news articles (later marked Exhibits A and B) dealing with the Brink's case and covering the period from January 12, 1956 to February 13, 1956. Each special pleading, so far as here material, contained the same two grounds (grounds 1 and 6) and concluded with the prayer that the Commonwealth be ordered to file a replication or other answer, that the special pleadings be set down for hearing, and that the indictment or the prosecution thereof might be quashed, abated or barred, as the case might be. (R. 6, 15-63.)

Ground 1 alleged that the indictment was returned in violation of Art. 12 of the Declaration of Rights of the Constitution of the Commonwealth and the Fourteenth Amendment to the Constitution of the United States. The supporting allegations were that prior to the commencement of and during the grand jury proceedings the district attorney, his assistants and investigators, "other officials of the Commonwealth," the Federal Bureau of Investigation, and the Federal Department of Justice, and each of them, "issued and caused or permitted to be issued without denial, retraction, minimization or suppression . . . . news releases and statements setting forth in great detail that the so-called Brink's robbery had unequivocally been

solved; that the said defendants together with other defendants had unequivocally planned and committed the so-called Brink's robbery; how the robbery was solved; how the robbery w planned and committed by the said defendants together with the other defendants; the criminal record and so-called background data of each of the defendants; and linking the disappearance, death or murder of others and other crimes with the so-called Brink's robbery and the said defendants"; that "such releases and statements appeared under large and sensational headlines in great detail in every daily newspaper published in Boston and in every, or nearly every, daily newspaper published not only elsewhere in Massachusetts, but throughout the nation"; that "such releases and statements, or detailed summaries thereof, were repeatedly broadcast and televised over radio and television stations located in Massachusetts, as well as over national hookups heard and seen in Massachusetts"; and that "such news releases and statements and the wide-spread and sensational publicity given them as aforesaid were calculated to and did tend to convince the public, in general, and the grand jury, in particular, of the guilt of each of the defendants and to arouse their animosity, indignation and prejudice towards and against each of the said defendants." (R. 15-16.)

Ground 6 alleged that the defendants were "unable to secure a fair and at the same time speedy trial" as guaranteed by Arts. 1, 11 and 12 of the Declaration of Rights of the Massachusetts Constitution and the Fourteenth Amendment to the Federal Constitution. The supporting allegations were that "continuously ever since the return of this indictment the District Attorney for the County of Suffolk, his Assistants and Investigators, other officials of the Commonwealth of Massachusetts, the Federal Bureau of Investigation and the Department of Justice,

and each of them, have issued and caused or permitted to be issued without denial, retraction, minimization or suppression . . . news releases and statements setting forth in great detail: that the so called Brink's robbery had unequivocally been solved; that the said defendants together with the other defendants had unequivocally planned and committed the so-called Brink's robbery; how the robbery was solved; how the robbery was planned and committed by the said defendants together with the other defendants; the criminal record and so-called background data of each of the defendants; linking the disappearance, death or murder of others and other crimes with the Brink's robbery and the defendants; what Joseph "Specs" O'Keefe, one of the defendants who has heretofore pleaded guilty, or a member of his family, have said implicating the defendants not only in the Brink's robbery but in other crimes including murder, kidnapping, the escape of "Trigger" Burke and larceny; how the said Joseph "Specs" O'Keefe has stated that a $200,000.00 defense fund had been established by the defendants; how the said Joseph "Specs" O'Keefe has accused other of the defendants of stealing from him his share of the Brink's robbery loot; how part of the loot had been or was about to be recovered; where the bodies of those, supposedly murdered by the defendants had been, or were suspected of being, buried; and how other defendants had confessed"; that such "releases and statements have frequently appeared in magazines having substantial circulations in Massachusetts and throughout the nation"; and that the "news releases and statements and the widespread publicity given them have been calculated to and tend to convince the public in general and any petit jury which may be selected in the future to try this indictment, in particular, of the guilt of each defendant, and to arouse and maintain their animosity, indignation and prejudice towards and against each of the said defendants." (R. 6, 355, 430.)

On March 6, 1956, petitioner McGinnis filed to each indictment returned against him on January 16, 1956, a motion to quash, a plea in abatement and a plea in bar and in support of each the same affidavit to which were annexed six exhibits including the Department of Justice news release and incorporating by reference a seventh exhibit consisting of the same two volumes of news articles (later marked Exhibits A and B). Each special pleading, so far as here material, contained the same two grounds (grounds 1 and 6) and sought the same relief as the special pleadings previously filed. (R. 545, 606, 635, 696, 706, 716, 726, 736, 746, 756.)

Between February 13, 1956, the date of the last article contained in the two volumes of news articles (later marked Exhibits A and B), and May 29, 1956, at which time hearing was commenced on the issues raised by petitioners' special pleadings, the prejudicial publicity continued unabated. (R. 16.)

Summaries of, or excerpts from, what appeared in the press during that period follow:

Under a front page headline, "FIND GIRL WHO CARRIED BRINK CASH TO KILLER", a sub-headline on the front page, "Pay Off Money fo 'Trigger Burke," and a page 3 headline, "QUEEN OF DOCKS PAID OFF TRIGGER", th re appeared a story that "Elmer 'Trigger' Burke was maintained on stolen money from the $1,219,000 Brinks robbery taken to him by a blonde woman friend well known on the New York waterfront,* according to information received by District Attorney Garrett H. Byrne's office yesterday. After 'Trigger' was spirited out of the Charles Street jail in one of the nation's most sensational prison deliveries, the blonde woman carried money to him that was supplied by the Brink's gang* ... According to the

* There was no such evidence offered by the government or admitted at the trial.

district attorney's information, the gang who brought 'Trigger' here to wipe out Joseph J. 'Specs' O'Keefe, promised Burke that if he got into jail, they would get him out and when they had accomplished that, they would support him in style.* Authorities declare that the gang did just that and did it on the Brink's loot.* The blonde, a close friend of 'Trigger's' is the same woman who visited District Attorney Byrne two weeks ago. She is a constant visitor to 'Trigger' in the death house at Sing Sing where he awaits execution and is an intermediary in his efforts to make a deal with Massachusetts authorities whereby he will spill all he knows on the Brink's robbery on the guarantee that his death sentence will be commuted to life imprisonment.'" (Ex. C, pp. 393, 394, 395.)

Under a headline, "GUSCIORA DENIES O'KEEFE STORY ON BRINK'S HOLD-UP", there was a story that Stanley A. Gusciora, "Boston gunman and close pal of Joseph J. 'Specs' O'Keefe, in Western State Penitentiary here (Pittsburgh) today denied O'Keefe's confession naming them and nine others as the masked bandits who staged the Brinks $1,218,211 robbery". The high law enforcement official who disclosed the story said that the details of a lengthy conference held in prison this morning between Gusciora and Attorney Paul T. Smith of Boston, were overheard and are in his possession.'" (Ex. C, p. 402.)

Under a front page headline, "BRINKS PROBERS SET TO ARREST HUB LAWYER AND WOMAN TODAY", there appeared a story that "first assistant district attorney Edward M. Sullivan said that 'a Boston attorney and a greater Boston woman will be taken into custody charged with suspicion of being accessories before the fact of the huge hold-up. Detectives attached to the staff of District Attorney Byrne will take the pair into custody tomorrow

* There was no such evidence offered by the government or admitted at the trial.

morning and bring them to Mr. Byrne's office. We plan to question the pair at length in connection with the Brink's robbery and we intend to book both on charges of being accessories before the fact of the robbery.'[18] . . . Mr. Sullivan also disclosed the fact that 'we have in our possession several admissions from Stanley A. Gusciora which we obtained from him in connection with the Brink's robbery'* . . . Four lawyers—two from Massachusetts and two from Pennsylvania—have been under suspicion in connection with the Brink's robbery for the past six years, officials admitted last night. In addition, at least five women close to or employed by members of the Brink's gang have been under close surveillance in connection with the robbery, Asst. District Attorney Sullivan disclosed. Still at large among the ten alleged bandits . . . are James Faherty . . . and Thomas F. Richardson. . . . Both, it is also understood, have been seeking to make 'a deal' in connection with the charges against them. The nature of the proposed 'deal' isn't known.' Neither Faherty nor Richardson is one of those whose arrests were ordered last night by District Attorney Byrne, Assistant District Attorney Sullivan said . . ." (Ex. C, pp. 403, 404, 405.)

Under a front page headline, "WOMAN'S PART IN BRINK'S JOB MAY BE TOLD", and an inside headline, "Brink Probers Quiz Man, Seek Woman", there appeared a story that "District Attorney Garrett H. Byrne announced today that his agents have picked up a man for questioning in the $1,218,211 Brink's robbery and that the arrest of a woman accomplice is imminent. . . . 'The man is being held for questioning', Byrne said. 'I cannot reveal his identity at this time. The woman we are looking for

[18] At no time has any lawyer or woman been charged with any offense linked to the Brink's robbery.

* There was no such evidence offered by the government or admitted at the trial.

is married. She is not any kin or associate of Joseph 'Specs' O'Keefe. Her home is surrounded. We expect to pick her up shortly. Contrary to some reports the man now in custody is not a lawyer' . . . Although Sullivan declined to reveal what role the government believes the pair had in a robbery that for daring and loot was the tops in American criminal history, it was indicated that they played important parts in the pinpoint planning that preceded the actual theft . . . Gusciora, though safely on ice in Pennsylvania, is assuming more importance to Byrne's office with every passing day. He has joined O'Keefe in spilling whatever he knows about the robbery* and is expected to be a prosecution witness when the case comes to trial. Sullivan left virtually no doubt that Gusciora had talked." (Ex. C, pp. 406, 407, 408.)

Under a front-page headline, "SECOND BRINK BANDIT TALKS", a sub-headline, "Gusciora To Corroborate O'Keefe", and an inside page headline, "Second Brink Bandit Tells Full Story", there was a story that "a second Brink bandit has talked and has made admissions which confirmed the confession of Joseph A. 'Specs' O'Keefe," it was learned last night. . . . Confirmation of this disclosure came in the form of an announcement by Assistant District Attorney Edward M. Sullivan that Gusciora will definitely be called as a government witness when the Brink's case goes to trial. Sullivan, who is handling the prosecution, made the statement following an announcement by District Attorney Garrett H. Byrne that two more persons, a man and a woman, are to be arrested on charges of being accessories before the fact of the fabulous robbery. . . . It was a mile from Gusciora's home in Stoughton that parts of a panel truck, believed used in removing the Brink's loot, were found after the robbery. They had

* There was no such evidence offered by the government or admitted at the trial.

apparently been cut up with an acetylene torch. Six months after the robbery on June 12, 1950, he (Gusciora) and Joseph J. 'Specs' O'Keefe, who has pleaded guilty to the Brink's robbery were arrested in Tonawanda, Pennsylvania, on gun-carrying and burglary charges. . . ." (Ex. C, pp. 409, 410, 411.)

Under a headline, "MYSTERY BRINK'S WITNESS BACKS UP O'KEEFE STORY", it was reported that "Suffolk County prosecuting authorities took a long step forward in their pre-trial probe of the Brink's robbery yesterday when they came up with a mysterious witness they described as 'vitally important' in the case. . . . 'This confrontation was completely corroborative of O'Keefe's story', said Assistant District Attorney Edward M. Sullivan who will prosecute at least six and possibly nine defendants on a multiplicity of indictments in connection with the great cash robbery of January 17, 1950. 'I cannot say any more than that', added the prosecutor. . . . Persons close to the investigation speculated that yesterday's witness is an employee of Brinks, named by O'Keefe as a person who saw him in the money fortress on Prince Street the night of the robbery or was in the vicinity of the building the night before.' 'Known to authorities for some time is the fact that O'Keefe was on Prince Street in Boston's North End on January 16, 1950, just twenty-four hours before the hold-up." (Ex. C, p. 412.)

Under a headline, "NAB 3; ONE AS BRINK WITNESS", a story reported that "investigation of the Brink's robbery by District Attorney Garrett H. Byrne has indicated the three possess 'vital knowledge' concerning the hold-up, prior to the time it was staged. Attaches of the District Attorney's said at least one of the three will be held on a charge of accessory before the fact and that he

* There was no such evidence offered by the government or admitted at the trial.

will 'positively' be a government witness. . . . It was hinted that at least one of the trio under questioning was being 'cooperative' ". (Ex. C, p. 413.)

Under a front page headline "NEW BRINK TRIO AIDS STATE", and an inside page headline, "MYSTERY TRIO BACKS O'KEEFE BRINK'S FACTS", appeared a story that three "mystery witnesses, two men and the wife of one of them, have corroborated vital parts of the confession of Joseph J. 'Specs' O'Keefe in connection with the Brink's robbery, and the prosecution now believes it has an iron clad case for presentation to a jury. . . . So important was the testimony of these witnesses considered, their identities will not be revealed until the trial and they are being kept under a twenty-four hour guard for their own safety, it was revealed. The two men and the woman did not take part in the actual million dollar robbery, it was learned, but were involved in the set up and were able to testify of their own knowledge.* It was learned that while the three were being questioned they were brought face to face with O'Keefe, and in his presence repeated the statements they had previously made. . . . Neither District Attorney Byrne nor his first Assistant Edward M. Sullivan, would comment on the nature of the information received from the witnesses other than to say that they were fully cooperative, had furnished important information vital to the case, and when confronted by O'Keefe had corroborated parts of his confession. From other sources it was learned that the prosecutors were jubilant of the 'break' and that the trio would be used as star witnesses when the case goes to trial. . . ." (Ex. C, pp. 414, 415.)

Under a headline "GANGLAND'S HOTTEST TARGET, the New York Mirror featured a story to the effect that "three men already lie dead along the trail of golden

* There was no such evidence offered by the government or admitted at the trial.

blond" Bobby Greenlease who was kidnapped in Kansas City and questioned whether that death toll would be surpassed by "the five murders and a suicide attributed by Boston's district attorney to the recently solved Brink's case".* (Ex. C, p. 418.)

Under a front page headline, "BRINK CASE KILLERS PROWL HUB", a front page sub-headline, "Specs O'Keefe Under 24-Hour Machine Gun Prison Guard; 4 In Plot To Slay Informer", and a second page headline, "Gang Plot To Kill O'Keefe Foiled", there was a story that Specs O'Keefe, star government witness in the Brink's case "has been placed under a 24 hour special machine gun guard as result of the invasion of Boston by four known New York killers. . . . The out of town gunmen came here with the intention of silencing O'Keefe, authorities believe.* The authorities are also sure the gunmen were to intimidate other witnesses who have corroborated important parts of O'Keefe's confession.* As a result, a heavy machine gun guard was thrown around East Cambridge jail where O'Keefe is confined. . . . The other witnesses were placed under guard. . . . Because of the alertness of the local officials and the FBI, the plot was foiled and the hoodlums left. A minor objective, which also failed, was to collect contributions for the defense of Brinks defendants from the local underworld, it was reported.* Early last week the offices of District Attorney Garrett H. Byrne and the FBI were alerted by New York officials to the fact that four waterfront gunmen were en route to Boston. The identities of three of the hoodlums were furnished and local officials were warned to be on the lookout in the belief they meant serious business. It was learned that a conference was immediately held between Byrne, Edward Powers, FBI Agent in Charge, Asst. District Attorney Edward M. Sullivan, handling the Brink's case, and Captain

* There was no such evidence offered by the government or admitted at the trial.

Francis G. Wilson of the Homicide Squad who heads the District Attorney's investigators. Following the conference it was learned that FBI agents and detectives working out of Byrne's office picked up the trail in town of the New York gunmen. . . . The investigators, tailing the visitors day and night, learned that their mission was three-fold. First was to be silencing of O'Keefe by death so that the government would be deprived of its most important witness when the Brinks case goes to trial.* Second, it was learned, was the intimidation of witnesses who had been questioned at the District Attorney's office since January 12th and have given important information.* Third was the attempt to collect defense money from the underworld.* . . . So critical was the situation considered that five top FBI agents were flown here from Washington to help in guarding witnesses and taking preventive steps should the invaders decide to move in. Guarding of certain of the witnesses was considered extremely important as it was on their evidence that the grand jury returned 80 additional indictments against Anthony Pino. . . . Early Saturday the four gunmen flew back to New York but the special guards and the alert are still being maintained in the event that they return . . .'" (Ex. C, pp. 429-432.)

Under a caption, "EDITOR'S NOTEBOOK", it was stated in part "Lately you have seen the Brinks bandits yelling their heads off protesting they can't get a fair trial around here because the papers printed the stories of their arrests. The same cry was raised in the Maitland frauds and in the Trigger Burke escape. The news editor never has been able to figure this out. If J. Edgar Hoover announces some arrests and says in so many words that the Brinks case has been solved, what on earth are the newspapers supposed to do . . . ? 'He'd never have been convicted if it wasn't for the publicity', say friends of a

* There was no such evidence offered by the government or admitted at the trial.

man who finds himself in a jam. Don't worry too much. It wasn't the Herald that got him into trouble." (Ex. C, p. 437.)

Under a headline, "KILLERS, ROBBERS, FUGITIVES FBI'S 'MOST WANTED' ", there was a story to the effect that "as far as Boston is concerned 'Jimma' Faherty is tops on the list.... According to the FBI, Faherty helped plan the $1,219,000 robbery—high point in a criminal career that began when he was 22. Now 44, he has long been a partner in crime with Thomas F. 'Sandy' Richardson, Weymouth, the other Brink's fugitive...." (Ex. C, p. 438.)

Under a headline, "BRINK'S TRIAL TO PIT PROSECUTOR, DEFENDANT FOR SECOND TIME", there was a story that "history has a way of repeating itself and Suffolk Superior Court will see a second chapter written, involving a prosecutor and defendant who first fought a legal duel almost 13 years ago, when the so-called Brink's defendants are set to trial probably in June"; that McGinnis had been tried on January 31, 1943 for receiving stolen goods;* and that "now almost 13 years later, prosecutor Sullivan once again will be using a self-confessed bandit." (Ex. C, p. 441.)

Under a headline, "NEW BRINKS CASE FIGURE UNDER HOSPITAL GUARD HERE", there was a story that "a new figure in the Brink's robbery investigation, one who purportedly held part of the $1,219,000 loot for a time is under a police guard at the City Hospital, it was learned last night. A 56 year old former Malden trucking contractor, also described as a close friend of the late Joseph Sylvester Banfield of Charlestown, one of the eleven named by the FBI as the Brinks bandits.... It was reported that Capt. Francis G. Wilson and Detective John

* There was no such evidence offered by the government or admitted at the trial.

Howland of District Attorney Garrett H. Byrne's office, as well as FBI agents had been seeking the Malden man. . . . Banfield, a truck driver, who once worked for the man in the hospital, was alleged to have given the latter a substantial part of his $110,000 share of the armored car company loot for safekeeping.'" * (Ex. C, p. 442.)

Under the headline, "$111,000 Brink Case Pay Off Is Revealed" appeared the story that "questioned at his bedside at City Hospital by Boston police and FBI agents, a long sought figure in the fabulous Brink hold-up started to 'talk' yesterday and revealed how he saw the 'brains' of the Brink gang pay off $111,000 to one of the participants.* Identity of the arrested man captured in Malden on Sunday was kept a closely guarded secret by both District Attorney Garrett H. Byrne and FBI agents because they feared retaliation. This was the reason for the heavy police guard at the hospital. . . . Banfield and the man in protective custody were friends for years and police learned for the first time yesterday that he was present when Banfield received his share of the loot.* He returned to Banfield's Charlestown home and helped Banfield count the money. Once the counting of the money was completed, Banfield gave his friend $5,000.00.* . . . It was learned that Banfield and his friend inserted $20,000 in a piece of scrap pipe, sealed both ends and then tied a wire to the pipe. The money remained there until Banfield was stricken with a heart attack and died. Apparently others in the Brink's set up knew of the hiding place because soon after Banfield died, a friend of one of the key men in the gang arrived at Banfield's home. . . . In the presence of Banfield's family the man muttered, 'he took the dough'.* Police know the identity of this man and are looking for him in all his familiar haunts. They had detectives checking

* There was no such evidence offered by the government or admitted at the trial.

last night because if he 'talked' he could tie another loose end in the investigation.... Capt. Wilson confirmed late last night that he had talked with a man at City Hospital and that 'close to the belly' information had been received." (Ex. C, p. 443.)

Under a caption, "FBI 'RAPS' CODDLING OF CONS" and a Washington by-line, J. Edgar Hoover was quoted as having delivered "sharp blasts at judges who coddle hardened criminals and authorities who run 'country club' prisons.... The FBI Chief said no one is helped by 'fuzzy and shallow thinking which contributes to maudlin sentimentality'. As a sample of his feelings on 'ill advised parole and probation' Hoover noted that members of the 11 man gang alleged to have carried out the Boston Brink's robbery received twenty paroles and seventeen probations, plus one deportation pardon. He gave numerous other examples of other 'fiendish' crimes traced to persons on probation and parole, and declared, 'Society suffers when any unit of the vast machinery of criminal justice places the interests of the wrong doer above the protection of society.'" (Ex. C, pp. 444, 446.)

Under the headline, "SECOND BRINKS FUGITIVE AMONG 'MOST WANTED'", there was a story to the effect that "in 1936 Richardson served a prison sentence for armed robbery at Somerville. He was paroled in 1941.... "Richardson had a curious alibi when questioned about the Brink's robbery. He told FBI agents 'I don't know whether I was home, working or drunk at the time of the robbery'... He is described by police as a heavy drinker. They believe one of his activities at the time of the robbery was operating big dice games in Boston." (Ex. C, p. 447.)

Under the caption, "KILLERS ON PAROLE", an editorial appeared approving J. Edgar Hoover's statement concerning the "coddling" of hardened criminals. "What

else but 'coddling' is it, when the worst and most dangerous criminals in the country find it so easy to get out of prison before the expiration of their terms, only to turn up in the headlines again with new crime running the whole range of violence and horror?'" (Ex. C, p. 450.)

There were six installments of a copyrighted and serialized story by International News Service.

Under the headline, "11 Improper Bostonians: Why Did Brinks Case Defendants Go Wrong", portions of the FBI news release were repeated including Hoover's announcement of the solution of the million dollar Brink's robbery. The story concluded, "From early in 1949 until the night of January 17, 1950, the FBI says, 'The Brink's gang rehearsed for the 'big score'. The dream of the sick criminal mind was about to come true: One big last haul and then quit for good.'" (Ex. C, p. 457.)

Under the headline, "11 Improper Bostonians: 'Brains' In Brinks Gang Hardened By 60 Bitter Years", there appeared a story featuring McGinnis and his police record and record of convictions.* (Ex. C, p. 458.)

Under the headline, "11 Improper Bostonians: Prohibition Era Influenced Young Pino", Pino's police and criminal records were featured.* He was quoted as having told friends "that he learned the art of safecracking in prison". His supposed activities on the night of the robbery were described in detail and it was stated that it had been arranged for a police lieutenant to "be called on by the defense to serve as an alibi witness for both McGinnis and Pino".[19] (Ex. C, p. 459.)

Under a headline, "11 Improper Bostonians: 'Unpre-

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* There was no such evidence offered by the government or admitted at the trial.

[19] In fact, petitioners Pino and McGinnis did call as a witness a Boston Police Lieutenant for the purpose of proving their defense of alibi.

dictability Characterizes O'Keefe' ", the fourth installment concluded by saying, "in the forthcoming trial of his colleagues with whom he has confessed to having conspired to commit the Brink's robbery, Joseph James O'Keefe will take the stand as a witness against them."* (Ex. C, p. 460.)

Under the title, "11 Improper Bostonians: Brink's Suspects Began Crime Life Early", Richardson, Faherty and Maffie were featured. Included were the police and criminal records of Richardson, Faherty, Maffie, Baker, Geagan and Costa.* It was said that "Costa was considered not only smart but a great guy behind the wheel of a get away car". (Ex. C, p. 461.)

Under another title, "11 Improper Bostonians: Brink's Suspects Lived As Suburbanites", the last installment repeated O'Keefe's story, discussed the alibis of petitioners, and concluded by stating, "from Washington, the FBI announced 'the solution of the million dollar Brink's robbery' ". (Ex. C, p. 462.)

Under the headline, "Brink Bandit Pair Meet Today", and the headline, "O'Keefe Will Bid Gusciora 'Come Clean' ", the story reported that O'Keefe will strive to persuade Gusciora to join him in turning state's evidence in the prosecution of the Brink's case. O'Keefe in addition to telling all about the huge robbery, has pleaded guilty to Brink's indictments . . . Since the FBI round up of the Brink's defendants January 12th, O'Keefe has reported to have talked on the telephone several times with Gusciora". (Ex. C, pp. 479, 480, 481.)

Under the headline, "GUSCIORA 'SLIPS' AID BRINK'S CASE", there was a story that "a key figure in the fabulous Brink robbery has made 'certain admissions' bolstering the prosecution case against 8 men held for

* There was no such evidence offered by the government or admitted at the trial.

the celebrated crime. This was disclosed when Stanley A. Gusciora, 36, of Stoughton, arrived here by train from Pittsburgh, in custody and heavily shackled . . . Authorities disclosed he has made a number of admissions apparently inadvertently, that confirm parts of the O'Keefe full story".* (Ex. C, pp. 488, 489, 496.)

Under the headline, "2 GIRLS' STORIES CRACK ALIBI OF BRINK'S SUSPECT" and two subheadlines, "Gusciora's Time Story Held False" and "Brink's Case Alibi Cracked", there was a story that "the FBI and investigators for District Attorney Garrett H. Byrne last night cracked the alibi of Stanley A. Gusciora. . . . Meanwhile District Attorney Byrne's investigators here said a second girl had hurled the lie at Gusciora. . . . A top investigator last night said that it 'now' is clear that establishment of alibis for that night was just as important a part of the whole enterprise as actually taking the money. The gang made it a point to be seen in bars, taverns and restaurants a short time before they descended on Brinks and to get back to public places as quickly as possible afterwards. There is reason to believe that several of them put themselves in the paths of police that night to be picked up as Brink's suspects. Now they can say they were in police stations that night with the elements of time, six years later, to be in dispute. (Ex. C, p. 511.)

Under the headline, "BYRNE KEEPS OPEN GUSCIORA SONG ROLE", the story appeared, "Rebuffed in his plans to pick up a second 'song bird,' District Attorney Garrett H. Byrne hurried his plans for a June trial of the Brink's robbery defendants, but with a faint and lingering hope that Stanley Gusciora . . . still may be cast in the role of a corroborating government witness." (Ex. C, p. 513.)

Indicative of the newspaper space accorded the Brink's case was a letter to the editor inquiring, "Isn't it about time you printed other news than the Brink's case . . . ?

It is getting to be as nauseous as the coverage of the Prince Ranier wedding to what's her name." (Ex. C, p. 520.)

Under headlines announcing the arrest of Faherty and Richardson, the FBI press release as to how the crime was committed was repeated. Asst. District Attorney Edward Sullivan was quoted as saying, "It probably will be some time today before it can be established whether the money seized last night was part of the Brink's loot." (Ex. C, pp. 506, 530, 531, 534, 539, 557.)

Under various headlines, "SOURCE OF COINS BRINKS BANK", "COINS MAY BE BRINKS", "BOTH COINS, GUNS MAY BE BRINK LOOT", "SEEK TO LINK COINS WITH LOOT FROM BRINKS", "COINS HELD BRINK TIE", stories appeared linking the $5,000 worth of coins seized at the time of the arrest of Richardson and Faherty with the Brink's loot.* (Ex. C, p. 562, 571, 574, 577.)

The prejudicial publicity, of which the foregoing appeared in the press prior to May 29, 1956, when hearing was commenced on the issues raised by petitioners' special pleadings, was issued and caused by the district attorney, his assistants, other state officials and officials of the Department of Justice. Such news releases and statements, and the wide-spread publicity given them, were calculated and did tend to convince any petit jury which might be selected in the future to try these indictments of the guilt of each petitioner and to arouse and maintain their (such jury's) animosity, indignation and prejudice towards and against each of the said petitioners. (R. 18-19.)

In the meantime, on April 12, 1956, petitioner McGinnis was arraigned on the indictments returned against him on January 16, 1956. He remained mute. A plea of not guilty

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* There was no such evidence offered by the government or admitted at the trial.

was entered by direction of the court; and the court ordered him to recognize personally in the sum of $100,000 on each indictment. (Tr. 28-30.)

On May 17, 1956, petitioners Faherty and Richardson, who had been apprehended the day before, were arraigned on the indictments returned against them on January 13, 1956. Upon assurance from the court that reasonable time would be allowed for the filing of special pleadings, each pleaded not guilty to each indictment, was given ten days in which to file special pleadings, and was ordered to recognize in the sum of $200,000 with double sureties. Because of an inability to furnish bail in that amount, they were committed to jail where they remained until convicted at which time they were committed to the Massachusetts Correctional Institution to serve their sentences. On May 28, 1956, petitioners Faherty and Richardson filed the same special pleadings as were previously filed by the others. (R: 8, 357-432.)

The trial judge heard arguments on the issues raised by the special pleadings on May 29, June 1, and June 4, 1956. At the outset he ruled that the special pleadings had been seasonably filed and were properly before the court (Tr. 53, 54). Both volumes of news articles covering the period January 12, 1956 to February 13, 1956, which accompanied the affidavits filed in support of petitioners' special pleadings, and a third volume of news articles covering the period from February 13, 1956, to May 29, 1956, were introduced in evidence and marked Exhibits A, B and C. After denying the right, claimed by petitioners, to introduce evidence in support of the allegations contained in their special pleadings and in the affidavit and exhibits offered in support thereof (Tr. 116, 118, 124, 202, 207, 208), and over petitioners' objections and subject to their exceptions, the trial judge ruled that the allegations contained in grounds 1 and 6 of petitioners' special pleadings and in the affidavit and news articles filed in support there-

of, even if taken as true, were not as a matter of law sufficient grounds to quash, abate or bar as the case might be. (Tr. 115, 117, 130-132, 195, 196, 202, 206, 207.) In speaking about the newspaper articles appearing in Exhibits A, B and C, the trial judge said: "Without prejudice, subject to change, the court is of the opinion right now that whatever was published in the paper will be taken as true unless the district attorney representing the Commonwealth makes an issue of any particular statement." (Tr. 128.)

On June 4, 1956, over the objection of petitioners that they could not get a fair and speedy trial as guaranteed them by both the state and federal constitutions and subject to their exception, the trial judge set August 6, 1956, as the date on which the trial would begin. At the time, the following colloquy took place:

> "The Court: . . . Let's make it clear here that if the defendants want a continuance on the ground that they may not get a fair trial, the Court will give that consideration, but that will be done at the request of the defendants, *and I would interpret it as a waiver of a claim for a speedy trial* (italics supplied). Now, I take it that the defendants do not intend to waive their constitutional right to a speedy trial, and they do not intend to waive any rights in so far as they presented a case for claiming that whatever trial is had and whenever it is had, it will not be a fair and impartial trial because of the abundance of publicity given this case throughout the Commonwealth of Massachusetts.
>
> "Mr. Smith: And the only way that we will go to trial, your Honor, is when we are ordered to go to trial by the Court over our objections on the grounds that we cannot get a fair and impartial trial.

"The Court: You are omitting the word 'speedy' now; as I say, the Court is ready to give you a speedy trial. *I am leaving open to you the question of whether you get a fair and impartial trial* (italics supplied). Of course, as far as the court personally is concerned, the Court will do his utmost to see that the defendants get a fair and impartial trial.

"Mr. Smith: We don't want an unfair and speedy trial; we don't want a partial speedy trial; we don't want a prejudiced speedy trial. We want a fair, impartial trial. We want it speedily if we can get it, but we say we have been prevented from getting it." (Tr. 209-212.)

Between May 29, 1956, the date of the last news article contained in Exhibit C, and August 6, 1956, the date on which the trial was scheduled to begin, the prejudicial publicity continued unabated. (R. 16-18.)

Summaries of, or excerpts from, what appeared in the press during that period follow:

Under a front page caption, "TWELVE CLAIM $100,000 REWARD, MUST AWAIT BRINKS TRIAL", there was a story that a special committee had been set up to consider claims for the reward which had been offered by Brinks. "Thus far no claimant has asked anonymity for fear of gangland reprisal as happened to Arnold Shuster of Brooklyn after he led police to nab Willy 'the Actor' Sutton . . . . Meanwhile, if you can't qualify for the Brinks reward money, take comfort in the knowledge that several millions of dollars of reward money always awaits informants about unsolved robberies murders, smuggling and income tax evasion." (Ex. D, p. 589.)

Under a front page headline "FIND BRINKS ASH HORDE IN BALTIMORE", there was a story that one Jordan Perry had been arrested in Baltimore and found

in possession of $4635.00" of the $1,219,000 cash stolen in the fabulous Brinks robbery.'" (Ex. D, pp. 591, 592, 593, 596, 597.)

Under a front page headline, $90,000 BRINKS LOOT FOUND HERE", "$90,000 BRINKS LOOT FOUND IN WALL OF SOUTH END OFFICE", there was a story "that approximately $90,000 of the Brinks $1,219,000 loot was recovered late yesterday afternoon by agents of the FBI and District Attorney Byrne . . . . At 8:30 o'clock last night the FBI and District Attorney Byrne positively identified the money as part of the $98,000 of Brinks stolen currency whose serial numbers had been broadcast throughout the world . . . . A brief joint statement was issued shortly before 10:00 p.m. last night by District Attorney Byrne and Special Agent Edward J. Hadgett of the FBI. 'The FBI and police attached to District Attorney Byrne's office today uncovered a cache of money linked to the Brinks cash which has been identified and is now being repossessed. $4635.00 recovered by the Baltimore police department upon the arrest of Jordan Perry in Baltimore out of $4,822.57 has also been identified as a portion of the Brinks loot.* The stories went on to repeat the murder of John Carlson, "believed to have been slain after disclosures he made relative to the Brinks robbery to District Attorney Byrne and Assistant District Attorney Sullivan . . . . was believed to have been taken for a ride and slain and buried on a lonely beach on the coastline north of Boston.* Carlson and Perry, according to statements the latter made in Baltimore, knew Elmer "Trigger" Burke, alleged professional New York gunman who attempted to machine gun O'Keefe to death in Victory Road, Dorchester, on June 16, 1954.'" (Ex. D, pp. 606, 607, 608, 609, 610, 611, 640.)

* There was no such evidence offered by the government or admitted at the trial.

Under a headline, "FIND FINGERPRINTS ON BRINKS CASH BOX", there was a story, accompanied by photographs of District Attorney Byrne and Assistant District Attorney Sullivan viewing the cash box found in the wall of a south end office, that "fingerprints which could prove to be the clinching telltale evidence long sought by the police and FBI in the six year old Brinks robbery were found by authorities today* . . . . Information about the fingerprints was guarded closely by investigators. They indicated they considered the prints equally important as evidence as was yesterday's recovery of $86,000 in stolen Brinks cash." (Ex. D, p. 654.)

Stories appeared to the effect that Perry, one Bucelli and one Bennett were to be charged "with being accessories after the fact to the Brink's robbery." (Ex. D, p. 660.)

Under a front page headline, "SPEC'S O'KEEFE WAS TOLD 'HOT CASH BURNT'", BRINKS DOUBLE CROSS THE KEY TO LOOT ROUND UP", there was a story to the effect that the sensational new break, the finding of the $90,000, in the fabulous Brink's robbery, "was the result of the sly double crossing of Joseph J. 'Spec' O'Keefe. O'Keefe is the much shot at Boston criminal who has given authorities the purported inside stories of the fabulous 1950 record breaking hodup. It was the second double cross handed O'Keefe, destined to be star witness . . . the first came when O'Keefe was swindled out of his promised share of 'safe' Brinks cash . . . The second concerned $90,986.00 with known serial numbers. O'Keefe had been told this was burned. Recovery of $4635.00 in Baltimore yesterday* and close to $90,000 later in a secret cache in the Boston South End revealed the extent of the O'Keefe double cross . . . Investigators concluded today that certain members of the gang must have

* There was no such evidence offered by the government or admitted at the trial.

been desperate for ready cash and started passing the red hot serial numbered Brinks bills."[20] (Ex. D, p. 663.)

Under the headline "THUMBNAIL SKETCH OF BRINKS CASE", a comprehensive chronology of the famed Brinks holdup was listed commencing with the date January 17, 1950:

> "May 14, 19[illegible] — Alfred Gagnon of Pawtucket, in Rhode Island State Prison, names Carleton M. O'Brien of West Warwick, Rhode Island, as principal in Brink's hold-up.*
>
> "May 17, 1952 — O'Brien slain by shotgun blast outside of his West Warwick home.*
>
> "May 19, 1952 — Convict Gagnon changes his story when questioned by Mass. authorities.*
>
> "June 16, 1954 — O'Keefe is machine gunned in Dorchester by Elmer Trigger Burke . . .*
>
> "July 15, 1954 — John H. Carlson, South End Bookie, disappears . . . after conferring with District Attorney Garrett H. Byrne. He has not been found and is believed to be a victim of a gangland slaying . . .*
>
> "Feb. 20, 1955 — O'Keefe indicates he will spill Brink's story but after questioning by Attorney General's office asks for more time to think it over . . .
>
> "Dec. 2, 1955 — Elmer Trigger Burke convicted of slaying barroom buddy in New York.*
>
> "Jan. 11, 1956 — Execution of Burke delayed by appeal. Some indicate he might have done some 'singing' on Brink's job to save own neck.*
>
> "Jan. 12, 1956 — FBI announces they have cracked Brink's case. Six suspects picked up.

[20] It should be remembered that O'Keefe was still being held incommunicado and that his contact with the press could only have been through state and federal enforcement officials.

* There was no such evidence offered by the government or admitted at the trial.

"Jan. 13, 1956 — Suffolk Grand Jury returns indictments against eleven alleged participants in robbery.

"June 4, 1956 — Judge Felix Forte overruled 1200-plus motions."[21] (Ex. D, p. 663.)

Under a headline, "MALIBOU BEACH NAMED BRINKS HIDING PLACE", it was reported that FBI agents and police investigators found a new undercover 'source — a source now 'feeding' the investigators new inside information . . . . The source has named the man who buried the cash as the central figure in the case."* (Ex. D, p. 672.)

Under a headline, "DOES YARMOUTH BEACH HIDE CARLSON'S BONES?" there was a story that Carlson, according to one version was strangled by a professional killer and buried in the beach at Yarmouth, Cape Cod.* He vanished August 2, 1954, the day he conferred with District Attorney Byrne about the robbery.* Carlson supposedly was rubbed out because he was a friend of Joseph "Specs"* O'Keefe and knew too much about the robbery.* . . . . Yarmouth, however, may yet fit as one of the pieces in the massive Brinks puzzle, . . . (Ex. D, p. 673.)

Under a front page headline, "4 MEN LINKED TO BRINK'S CASE SPLIT UP AT SOUTH SHORE HOUSE", and the sub-headline, "Perry Tells Police $5,000 Given Him Friday To Pass", there was a story to the effect that "disclosure that $30,000 of Brink's payroll recorded loot was delivered to a South Shore home Friday for circulation throughout the country* was made last

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[21] Actually petitioners first filed to each indictment seven documents: three special pleadings, a claim for jury trial for each special pleading and a motion for particulars.

* There was no such evidence offered by the government or admitted at the trial.

night ;shortly after District Attorney Garrett H. Byrne obtained 22 indictments containing 66 counts against three greater Boston men charging them with being accessories after the fact to the Brink's $1,219,000 robbery"; that Perry had stated that he had been in a South Shore home with 4 men whom he allegedly named; and that he had been told that he would receive one-sixth of $100,000 to spread the money.* (Ex. D, p. 684.)

Under the headline, "PERRY MAY SAY WHO GAVE CASH", there was a report that "investigators said that Perry will return voluntarily from Baltimore within the next twenty-four hours and tell his story.* Perry's return to Boston ties in with an assertion yesterday by District Attorney Garrett H. Byrne that he intended to present 'important other evidence' to the Suffolk Grand Jury." (Ex. D, p. 671.)

Under the headline, "TIGHTEN BRINK'S CASE JAIL GUARD", it was reported that "drastic security measures were put into effect today at Charles Street jail to safeguard 4 Brink's case prisoners held there. Two of them, Michael Vincent Geagan, 47 of Malde and Vincent James Costa. . . . The others are John F. Bucelli . . . and Edward Bennett." (Ex. D, p. 685.)

Under the front-page headline, "CARLSON'S KILLER IS NAMED", and the sub-headline, "Identified By Man Held As Brink's Loot Pusher", there was a story that the identity and whereabouts of Carlson's slayer had been obtained through Jordan Perry who had been arrested in Baltimore with $4,635 of serial recorded Brink's loot,* that the "four men Perry named after his arrest were all former associates of O'Keefe and Carlson"; and that two of the four men were the alleged slayers.* (Ex. D, p. 686.)

Other papers carried similar stories under headlines,

* There was no such evidence offered by the government or admitted at the trial.

"BRINK'S LINK TO SLAYING BARED", "PERRY NAMES CARLSON SLAYER", "NAMES KILLERS OF CARLSON IN BRINK EXPOSE".* (Ex. D, pp. 699, 702, 710.)

Under a front page headline, "BRINK'S WITNESS OFFERS TO TELL WHERE $1,219,000 LOOT HELD", there was a story that an "offer to bare all details in connection with the handling of the Brink's $1,219,000 loot was made yesterday to District Attorney Garrett H. Byrne by a key witness.* . . . The offer by the key witness was being considered and discussed last night by Assistant District Attorney Edward M. Sullivan with authorized representatives of the witness. The witness is described as an apparently well to do greater Boston resident as well as a director of a loan agency that specializes in loans to racketeers." (Ex. D, p. 712.)

Under a headline, "BRINK'S FIGURE OFFERS FACTS ON LOOT," there was a story that "investigators for District Attorney Garrett H. Byrne disclosed that a key figure in the six year old mystery who is not one of the accused defendants had made 'overtures' to disclose the source of the $90,000 in loot recovered this week."* (Ex. D, pp. 715-716.)

Under a front page headline, "BRINK'S WITNESS IS MURDERED, SHOT IN HEAD TWICE IN HIS CAR", there was a story that the slain Brink's witness . . . (William Cameron) had been furnishing District Attorney Byrne, Assistant District Attorney Sullivan, Capt. Frank G. Wilson, attached to Byrne's staff, and FBI agents with information relevant to the Brink's robbery."* The story revived the disappearance of John Carlson stating that "Carlson disappeared August 2, 1954, after he was lured from his South End home shortly after giving District

* There was no such evidence offered by the government or admitted at the trial.

Attorney Byrne information on the Brink's case.'" (Ex. D, p. 727.)

Similar stores concerning the murder of William Cameron who supposedly had furnished the government with evidence concerning the Brink's case were published under flamboyant headlines such as "BRINKS CASE FIGURE FOUND SHOT TO DEATH", "BRINK'S CASE FIGURE SLAIN IN GANGLAND STYLE", "HUNT BOOKIE IN BRINK SLAYING", "BRINK CASE FIGURE SHOT DEAD", "BRINK'S CASE MURDER".* (Ex. D, pp. 730, 731, 736, 740, 743.)

Under the headline, "BRINK'S CASE MURDER", the story went on to report that "one official probing the murder, declared flatly 'he was killed because he knew too much.'" The officials believe his death resulted from suspicion attached to him as the result of an important development in the investigation of the fabulous case. The spokesman said the victim had been questioned by the Boston police about certain aspects of the case but he had never been subjected to an FBI grilling . . . . Police said that Cameron (the murdered man) was friendly with at least two men long suspected in the Brink's hold-up.'" (Ex. D, p. 743.)

Under the headline, "COUPLE PARTIALLY IDENTIFY TWO BRINK'S WITNESS KILLERS", there was a story that "partial identification of two of the slayers of Brink's witness William Cameron, 49, of 359 Geneva Avenue, Dorchester, was furnished police officials last night by a Boston woman and a South Boston navy man . . . . Both witness asked for police protection before telling their stories, and police protection was ordered by District Attorney Byrne." (Ex. D, p. 744.)

Under a headline caption "CARLSON BODY DELIV-

* There was no such evidence offered by the government or admitted at the trial.

ERY SEEN SAILOR, WOMAN HEAD BRINK'S CASE PROBE", there was a story that "police last night disclosed they had eye witnesses to the delivery of the body of the slain William Cameron, purported Brink's robbery informer." . . . Detectives possessed information that the trio comprised hired killers from out of town engaged by local gangsters who 'spotted' Carlson for them." This was the pattern in the almost fatal machine gunning of Joseph J. 'Specs' O'Keefe, who since has told all about Brinks and unquestionably in the case of John Henry Carlson. . . . It was clear last night that organized crime was putting the pressure on authorities." * (Ex. D, p. 745.)

Under the headline, "GUARD GIRL WITNESS TO RIDE SLAYER", it was stated that "officials were reported to have declared that Cameron gave them no information of value on the Brink's case but that he was with several persons who have figured in the investigation since the $1,219,000 stick up was staged six years ago." * (Ex. D, p. 750.)

Under the headline, "BRINK KILLING CLUE FIZZLES", it was reported that "investigators were certain Cameron was 'rubbed out' for tipping the FBI to the Coleman Street, Dorchester apartment where Faherty and Richardson (two of the petitioners) were captured May 16th. One of the two slaying suspects has been identified as a South Shore resident already somewhat involved in the Brink's case. The other is a south Boston man with a sizeable record of conflict with the law." (Ex. D, p. 750.)

Under the front page headline, "BRINK'S KILLER KNOWN", there was a story that the "killer of William J. Cameron of Dorchester, one time Brink's robbery suspect, now is known, police disclosed today. . . . Police are convinced the murder is an aftermath of the Brink's rob-

* There was no such evidence offered by the government or admitted at the trial.

bery.* Today police were in possession of a new version of Cameron's role in the capture of two Brink case suspects — Thomas F. Richardson and James I. Faherty. Detectives said Cameron, who had a hand in helping the two get a hideout, tipped off the FBI how to find the place.* . . . 'That was the tip that led to their capture May 16', police said. 'This tip became the motive for Cameron's murder,' they said.* . . . Police and arson squad investigators were checking an unexplained fire which destroyed a $6,000 automobile last night in a Roxbury field near railroad yards. They sought a possible connection with the Brink's case." (Ex. D, p. 753.)

Under the headline, "6 STATE ALERT FOR 3 IN BRINK'S CASE MURDER", it was reported that "a six state alarm was sent out yesterday for the arrest of three men identified as new suspects in the gangland slaying of William Cameron . . . whom authorities say was murdered because he revealed information about the Brink's robbery.* . . . One of the three men in custody has a reputation as a waterfront strong man. Another is a Quincy resident who recently became involved in the Brink's investigation. . . . It was learned that Cameron was not the man who tipped off the FBI to the hideout being used by two recently arrested Brink's suspects. He was, however, actively associated with the intimates of several persons who have played a prominent part in the Brink's case. (Ex. D, p. 755.)

Under the front page headline, "FIND WOMAN WITNESS IN BRINK MURDER", it was stated that "authorities who are keeping the woman witness' identity a strict secret, say Cameron was murdered because he revealed information about the Brink's robbery."* (Ex. D, p. 756.)

Under the headline, "BRINK'S SLAYING PROBERS

* There was no such evidence offered by the government or admitted at the trial.

RELEASE DORCHESTER MAN", it was stated that "police last night released a 50 year old Dorchester longshoreman they had held since Sunday night for questioning in connection with the three day old slaying of William Cameron . . . reportedly a Brink's case informer."* (Ex. D, p. 760.)

Under the headline, "CAMERON KILLER'S TRAIL TURNS COLD", the story said that "Cameron was friendly with several others already mentioned in the Brink's probe, and detectives theorized he may have been killed in the belief that he passed on important information in the case to authorities."* (Ex. D, p. 760.)

Under the headline, "BRINK FIGURE SOUTH", it was reported that "a 25 year old greater Boston woman who may have vital information on the Brink's robbery has disappeared," police disclosed today. . . . She was described as a blond who had been in touch with Brink's case suspects from time to time." (Ex. D, p. 761.)

Under the headline, "BLONDE BRINK GO BETWEEN HAS VANISHED" and the sub-headline, "DISAPPEARED DAY LOOT WAS FOUND", there was a story that "a beautiful blonde girl who acted as a go between for key figures in the Brink's case was being sought by both the FBI and detectives attached to the office of District Attorney Garrett H. Byrne yesterday . . . Investigators say she had been living in a Boston suburb but completely dropped from sight the night $70,000 in Brink money was found in a Tremont Street, South End office. Authorities declare they want the woman for questioning and say she carried messages from one Brink's figure to another when they didn't want to be seen meeting each other. She is known to be friendly with several of the suspects in the big robbery."* (Ex. D, p. 762.)

* There was no such evidence offered by the government or admitted at the trial.

Under the headline, "FBI SWOOP FOR BRINK'S LOOT FAILS", there was a story that "a combined force of FBI agents and detectives from the office of District Attorney Garrett H. Byrne late yesterday staged another raid in search of Brink's robbery loot, but announced afterwards it was fruitless. Also, it was reported they were hunting evidence in the gangland slaying of William Cameron, accused of being a stool pigeon in the Brink's investigation." (Ex. D, p. 765.)

Under the headline, "BRINK RAIDERS IN NEW SWOOP", there was a story that "because of the killing of Cameron who had given information to the authorities in the Brink's case, it was learned that all witnesses in the case are being guarded".* (Ex. D, p. 767.)

Under the headline, "TWO RAISE $100,000 BRINK'S BAIL", and the sub-headline, "BYRNE PLANS FIGHT TO KEEP 'HOODLUMS' ", there was a story that Bennett and Bucelli who had been charged with being accessories after the fact to the Brink's robbery had raised the bail necessary for their freedom. Included in that story were the statements, "Since their arrest there has been a murder linked by authorities to the Brink's case. William Cameron of Dorchester who purportedly turned informer was found shot to death in Boston".* (Ex. D, p. 770.)

Under the headline "BYRNE HINTS NEW BRINK LEADS", it was reported that "District Attorney Garrett H. Byrne hinted broadly today that he has uncovered important new leads in the Brink's investigation but declined firmly to say what they were ... The District Attorney maintained that developments in the past few days which had been disclosed would make it unwise to admit Bucelli and Bennett to Bail." (Ex. D, p. 771.)

Under the headline, "PERRY MAY GIVE CLUE TO

* There was no such evidence offered by the government or admitted at the trial.

BRINK'S CASE", and then a sub-headline, "PERRY MAY PROVIDE KEY TO CARLSON MYSTERY, LOCATION OF BRINK'S CASE", the story reported that "police expect Jordan Perry . . . may provide answers to puzzling factors in the fabulous $1,219,000 robbery. Police seek the answers to the mysterious disappearance of John H. Carlson, a pal of Joseph 'Specs' O'Keefe, key figure in the Brink's case." (Ex. D, p. 776.)

Under the headline, "BYRNE FIGHTS RELEASE OF BUCELLI IN $100,000 BAIL", there was a story that "District Attorney Garrett H. Byrne yesterday linked a Rhode Island mob of gangsters to the Brink's $1,219,000 robbery and disposition of the huge cash loot." Information uncovered during the past several weeks by his special agents' . . . show that at least four of the men indicted in the Brink's robbery were in contact with a go between with the leaders of a Rhode Island gang." * (Ex. D, p. 780.)

Under the headlines, "DISTRICT ATTORNEY BYRNE LINKS BUCELLI TO PATRIARCA", "PATRIARCA WAS TAGGED RACKET BOSS", stories appeared linking Bucelli to one Patriarca, alleged racket boss in Rhode Island. (Ex. D, pp. 783-784.)

Under the headline, "BRINK LOOT CONFESSION", and the sub-headline, "PERRY CAPTURED IN BALTIMORE TELLS HIS STORY OF 'HOT MONEY'", there appeared a story that Jordan Perry . . . made a full confession to District Attorney Garrett H. Byrne and FBI agents yesterday of his part in trying to dispose of a portion of the $1,219,000 Brink's loot. Perry was questioned all day in the District Attorney's office . . . Perry according to the District Attorney's staff, gave a full and detailed account of how he was given thousands of dollars worth of the 'hot' bills included in the Brink's loot and

* There was no such evidence offered by the government or admitted at the trial.

sent out to pass them.* ... Perry, questioned not only by the District Attorney, but by Assistant District Attorney Edward M. Sullivan and Captain Wilson ... was an extremely cooperative witness". (Ex. D, p. 796.)

Under a front page headline, "BRINK'S SUSPECT GUSCIORA DIES IN CELL", and a sub-headline BRINK PRISON AIDES DOUBT SUICIDE OR VIOLENCE", Gusciora's death while in jail was reported. (Ex. D, pp. 803-804.)

Under the headline, "FOUL PLAY RULED OUT IN DEATH OF BRINK SUSPECT GUSCIORA", it was reported that Gusciora "died of a 'tumor of the brain'... State officials indicated last night that every phase of the one time hoodlum's death would be scrutinized for any possibility of foul play. But Massachusetts Corrections Commissioner Russell G. Oswald, after a preliminary investigation, said he was confident no violence was involved." (Ex. D, p. 806.)

Under the headline, "PROBE BRINK SUSPECTS JAIL DEATH", and the sub-headline "GUSCIORA MYSTERIOUS DEATH SPEARS PROBE", stories were carried not only about Gusciora's death but also implying that he had been murdered.* (Ex. D, p. 810) Under the headline, "PROBE GUSCIORA MYSTERIOUS DEATH IN PRISON", and the sub-headline, "SPECS EX PAL LATEST", there was a story that "a short time before, George R. Killeen, South Boston number pool operator, was shot to death in a side walk ambush. He had also been questioned concerning the Brink's case.* Just after Elmer 'Trigger' Burke tried to rub out 'Specs' O'Keefe in Dorchester with machine gun fire,* John Henry Carlson, O'Keefe's pal disappeared.* Carlson had been helpful to police. Both officials and the underworld agree Carlson

* There was no such evidence offered by the government or admitted at the trial.

was taken for a ride and murdered.* The body was never found. Last month William Cameron . . . believed to have 'tipped off' the police where they could find the Brink's loot, was slain.* . . . Several years ago Carleton M. O'Brien, Rhode Island club owner was slain with a blast from a shotgun near his home.* He had been a suspect in the case. There was a persistent suspicion George O'Brien, Weymouth ex-convict, was a fringe figure in the Brink's robbery.* (Ex. D, p. 812.)

Under the headline, "BURKE'S EXECUTION WILL NOT AFFECT BRINK'S TRIAL PLAN", there was a story to the effect that "District Attorney Garrett H. Byrne said last night that the execution of Elmer 'Trigger' Burke, a notorious hoodlum who staged a daring escape from the Charles Street Jail two years ago would have no effect on the Brink's trial date opening here August 6. ....At the time of his arrest here investigators quoted Burke as boasting that he had been brought here to kill O'Keefe.* It was theorized that the motive had been to seal O'Keefe's lips forever.* (Ex. D, p. 817.)

Under a headline, "STATE CLAIMS McGINNIS HIRE BRINK'S GANG", there was a story dealing with the Commonwealth's particulars filed as a result of petitioners' motions. Accompanying the story was a photograph of a Boston newspaper reporter "looking through a peep hole in the security door leading into the Brink's courtroom area. Only those with proper credentials will be passed through door when trial starts. A 24 hour a day guard is being maintained over exhibits and other evidence in District Attorney Byrne's office. Among them is said to be a voluminous file from the FBI containing evidence in the $1,219,000 robbery." (Ex. D, p. 821.)

Under the headline, "STRONG DOORS, NEW LOCKS

* There was no such evidence offered by the government or admitted at the trial.

IN BRINK'S COURT", there was a story that "workmen were busy yesterday transforming the seventh floor of the Suffolk County Courthouse into a maximum security area in preparation for the forthcoming Brink's trial. Locks were being changed on doors, double doors were being added to those already in place and massive new doors were being installed in both ends of the corridor outside the courtroom. . . . Separate benches also are being set up for the many security guards who will be on duty throughout the trial. The defendants will be brought from jail in vans and will be locked in cells on the half floor above. A big witness room in the rear of the courtroom is being transformed into a press room with teletype and telegraph machines and telephones being installed." (Ex. D, p. 822.)

Under the headline, "ROPE MAKER BRINK WITNESS", there was a story that "five out of state witnesses including the superintendent of a rope manufacturing plant turning out rope similar to that used to tie up the Brink's guards were summoned by District Attorney Garrett H. Byrne for the approaching trial of defendants in the $1,218,211 robbery. . . . Also summoned in was the manager of a Philadelphia Hotel who was directed to bring records of telephone calls made there by Joseph J. 'Specs' O'Keefe subsequent to the January 17, 1950, robbery. O'Keefe has pleaded guilty to participation in the crime and has turned states' evidence. . . . The others summoned included. . . . Henry Savage, Charles Magiotti and Alvan M. Cole." (Ex. D, p. 822.)

Under a headline, "BRINK'S TRIAL RUSH BEGINS", there was a story describing the identity of the five out of state witnesses summoned by the District Attorney. (Ex. D, p. 823.)

Under the headline, "PLAN TO SHIFT 8 HERE FOR BRINK TRIAL", it was reported that "all eight defendants in the Brink's case probably will be housed in the

Charles Street Jail during the $1,219,000 robbery trial which opens in Suffolk County court here August 6th. . . . The District Attorney's office is making tentative arrangements to bring the defendants into Boston from various jails throughout the state where they have been held since their arrest. (Ex. D, p. 824.)

Stories were carried under headlines announcing that 2,000 veniremen had been called for jury duty in the Brink's case, listing the names and addresses of each of the persons called together with the date for which each was called to appear. (Ex. D, pp. 824-827.)

Under the headline, "FANTASTIC HUNT ON FOR BRINK FIGURE", there was a story that "almost on the eve of the Brink trial it was discovered yesterday that a key government witness is missing and is being fearfully sought by the FBI." Prior to the disclosure the fact that an important witness was missing was a closely guarded secret, so much so it was believed that the prosecution was fully prepared for the start of the trial August 6th. District Attorney Garrett H. Byrne, his aides and the FBI declined to identify the man being sought. The only information available that he was 'out of the state' and 'we hope to find him in time for the trial'". (Ex. D, p. 828.)

Under a headline, "BRINKS DEFENDANTS INSIST THEY CAN'T GET FAIR TRIAL", there was a story purporting to set forth the position of the petitioners. Included in the story was the FBI news release of January 12, 1956, setting forth that "the Department of Justice announced that intensive investigation by the FBI for the past six years has resulted in the solution of the million dollar Brink's robbery." (Ex. D, p. 829.)

Under the headline, "BRINK FIGURE FEARED SLAIN", there appeared a story that "a mysteriously

* There was no such evidence offered by the government or admitted at the trial.

missing star witness in the Brink's case was believed by officials yesterday to have been killed to prevent his testifying at the trial which begins August 6th.* FBI agents have been hunting the witness throughout the country and have found no trace of him. He was recently questioned by detectives attached to District Attorney Garrett H. Byrne's office. . . . He is declared to have some knowledge of the actual preparation of the big robbery and to have frequented a place in Charlestown where the stolen money was to be dropped if anything went wrong with the original plans.'"* (Ex. D, p. 829.)

In connection with the headline, "STAGE SET FOR BRINK'S TRIAL OPENING", there appeared pictures of the trial judge who was to sit on the case and a picture showing police officers and employees of Brinks standing in the vault room where the robbery took place. The story was to the effect that "the long awaited Brink's case trial will begin on the heavily guarded seventh floor of the courthouse. . . . The entire world will be watching as the FBI acting through the Suffolk County district attorney attempts to prove that it has solved the greatest robbery in American history. . . . Many shadowy underworld figures who may have been connected with the robbery are missing or murdered.* Nobody knows for sure what happened to men like the bookie John H. Carlson.* The apparent suicide of George O'Brien, the Danvers defendant, has never been satisfactory explained, nor has the recent murder of William Cameron of Dorchester.'"* (Ex. D, p. 830.)

In connection with the headline, "BRINK CASE 8 IN SAME JAIL", there were full page photographs of petitioners taken as they were walking in the jail yard during an exercise period and the story that the "Charles Street

* There was no such evidence offered by the government or admitted at the trial.

Jail now houses all eight defendants in the Brink's robbery case and will continue to do so during their trial which begins next Monday." (Ex. D, p. 837.)

There was a series of three syndicated articles. The first, under the headline, "CLAIM OF CENTURY—BRINK'S HOLD-UP DEPICTS BOSTON IN STRANGE LIGHT—Since Robbery, Austere Front of City Has Been Ripped Away", discussed the robbery and the method by which it was committed and stated in part, "with this, the gunmen left, pulling the money sacks. A half hour later, Boston was in a turmoil—and the Brink's robbers were back in Roxbury". (Ex. D, p. 840.)

The second story which appeared under the headline, "THE GREAT BRINK'S ROBBERY—CASE COULD MAKE D.A. SHOE-IN FOR GOVERNOR—Specs O'Keefe Key To Byrne's Future—", was to the effect that "in the carpeted sixth-floor office of Garrett Byrne, . . . the District Attorney was talking about the biggest robbery in history. Gripping things make up the Brink's case . . . over a dozen murders* . . . a suicide* . . . money found in a dingy rooming house, but almost a million still unaccounted for . . . and a gangster talking. . . . 'Mr. O'Keefe is right in there now', he (District Attorney Byrne) said. 'He has been with us for some time now. He has a fantastic story to tell, if you care to be mild about things, but my main interest is what those twelve people in the jury have to say. They're the important ones now'. . . . The FBI, too, want this one badly. From J. Edgar Hoover in Washington down to the Boston Bureau. . . . 'We were the only agency to keep working on this case right through', Edward J. Powers, the FBI Boston head stresses. 'The Bureau wants that in the record'. Hoover took the case as a personal insult, many maintained, and he kept a day

* There was no such evidence offered by the government or admitted at the trial.

by day pressure on the suspects. . . . Authorities never have officially admitted that such evidence (wire tapping) had been gathered, but it is an open secret in Boston that they had recorded conversations of those now up for trial." (Ex. D, p. 841.)

The final story in the series was captioned "CRIME OF CENTURY—Brink's Suspects Gave 'No Show of Money'", and was accompanied by pictures of petitioners McGinnis, Pino and Maffie. The story set forth that "Anthony Pino is one of Boston's best known criminals.* . . . Despite a record of 62 arrests, he lived quietly in a fair to comfortable home in the Dorchester section. . . . Joe McGinnis is no new comer to law trouble.* . . . 'McGinnis', one who knows him says, 'is a millionaire'. . . . Police and FBI say he was the major planner. . . . 'These men had everything they wanted,' the FBI's Edward Powers countered. 'They weren't dumb enough to live flashy. Just day by day living was enough.'" (Ex. D, p. 841.)

Under the headline, "HINT FAST HALT OF BRINK TRIAL", there was a story summarizing the charges against petitioners and stating that "O'Keefe is under constant guard at East Cambridge Jail. The eight defendants are all housed at Charles Street Jail where extraordinary precautions have been taken. Every day of the trial a prison van containing the eight defendants will be ringed by police cars and special police details will stop all traffic during the short trip from the jail to the courthouse. In the courthouse the entire seventh floor has been blocked off and admittance to it will be by special pass only." (Ex. D, p. 843.)

Under the headline, "EPIC BRINK TRIAL UNDER WAY TODAY", the story was carried that "The opening day of the trial will see the Pemberton Square Courthouse operating under one of the strictest security programs in

* There was no such evidence offered by the government or admitted at the trial.

the history of Massachusetts trials. Admission to the seventh floor will be by pass only." (Ex. E, p. 845.)

The prejudicial publicity, of which the foregoing summaries and excerpts are only samples of what appeared in the press prior to August 6, 1956, the date on which the trial was scheduled to commence, was issued and caused by the district attorney, his assistants, and other state officials and officials of the Department of Justice. Such releases and statements appeared continuously "under large and sensational headlines in great detail in every daily newspaper published in Boston and probably in every daily newspaper published not only elsewhere in Massachusetts but throughout the nation". Such releases and statements appeared frequently "in magazines having substantial circulations in Massachusetts and throughout the nation". Such news releases and statements, or detailed summaries thereof, were "continuously broadcast and televised over radio and television stations located in Massachusetts, as well as over national hook-ups heard and seen in Massachusetts". Such news releases and statements and the wide spread publicity given them were calculated and did tend "to convince . . . any petit jury which may be selected in the future to try this indictment . . . . of the guilt of each defendant, and to arouse and maintain their (such jury's) animosity, indignation and prejudice towards and against each of the said defendants". (R. 18-19.)

On August 6, 1956,[21a] the day set for the commencement

[21a] By this date, the seventh floor of the court house had the appearance of a fortress. Security doors were installed outside of the court room area with peep holes. Only those with proper credentials were permitted to even gain access to the seventh floor. Separate benches had been installed in the court room for the many security guards who would be on duty throughout the trial. The defendants were to be brought from the jail in vans which would be ringed by police cars. A big witness room at the rear of the court room had been transformed into a press room with teletype and telegraph machines and telephones. (Ex. D, pp. 821, 822, 843, 845.)

of the trial, petitioners filed a second motion to quash, a second plea in abatement, and a second plea in bar, contending that they were unable to secure a fair, and at the same time, speedy trial as guaranteed by the state and federal constitutions, and a second affidavit in support thereof. (R. 78-83.) The second special pleadings reaffirmed the allegations contained in grounds 1 and 6 of the first group of special pleadings and the statements contained in the first affidavit. The second affidavit set forth that since the making of the first affidavit "and continuing until the present, the release of stories to the Boston newspapers by officials of the Commonwealth of Massachusetts and stories written by such newspapers on their own initiative have aggravated the effect of the Federal Bureau of Investigation press release issued to the press on January 12, 1956, and also the effect of other statements given by officials of the Commonwealth of Massachusetts to the press since then, by tending to establish the belief that the said defendants were guilty and that the said defendants and their alleged associates were dangerous criminals connected with other serious crimes." The second affidavit continued that between May 29, 1956, and August 6, 1956, news articles had appeared linking petitioners with the murder of Carleton M. O'Brien of Rhode Island; the machine gunning of "Specs" O'Keefe by Elmer "Trigger" Burke; the disappearance of John H. Carlson, a South End bookie supposed to have been a friend of "Specs" O'Keefe; with the murder on June 11, 1956, of William Cameron who was supposed to testify for the government in the Brink's case; attesting on the eve of the trial to the feverish hunt by the FBI for a key state Brink's witness who was feared to have been slain; and reporting that many shadowy underworld figures who had been connected with the robbery were either missing or murdered. The second affidavit concluded with the state-

ment that "at no time have officials of the Commonwealth or the Federal Bureau of Investigation or this Honorable Court taken any action to repudiate or in any way minimize the highly inflammatory effect of the stories and headlines carried or being carried by the press circulating in Boston and throughout Massachusetts. Nor have they taken any steps to make it possible for the same defendants to receive a fair, impartial and at the same time speedy trial."

The three volumes of news articles covering the period from January 12, 1956, to May 29, 1956, previously marked as Exhibits A, B and C and two more volumes covering the period from May 29, 1956, to August 6, 1956, were introduced in evidence in support of their second special pleadings. The last two volumes were marked Exhibits D and E. (Tr. 257, 333.) After argument, these second special pleadings were overruled and denied, subject to petitioners' exceptions, on the same basis as had been the first special pleadings. (Tr. 302.)

The Commonwealth then moved for trial of petitioners on the thirteen indictments. Over the objection of petitioners that under all the circumstances it was unfair to try them at that time, the trial judge allowed the Commonwealth's motion and petitioners claimed an exception.

Writs of venire facias had previously been served on 2,000 persons requiring their attendance for jury duty in this case. They were summoned to appear in groups of 100 on consecutive days starting on August 7, 1956.

On August 7, 1956, the voir dire examination of prospective jurors commenced. By leave of court, FBI agent Larkin who, according to the district attorney, had "been instrumental in the preparation of this case" was permitted to remain at the prosecutors' table during the entire trial. (Tr. 319.) Later, when the introduction of evidence com-

menced, the same permission was granted for FBI Agent in Charge Powers.

Prior to the examination of any veniremen, petitioners filed a motion for questions to jurors listing thirty-six questions. That motion was taken under advisement. Immediately after the first prospective juror was declared indifferent by the court and satisfatcory to the Commonwealth, petitioners moved for leave to conduct a voir dire; moved that the trial judge put the questions listed in their motion for questions to each prospective juror; introduced in evidence once again the affidavits in support of their special pleadings and the five volumes of newspaper articles covering the period from January 12, 1956 to August 6, 1956; and offered to prove that if that prospective juror were allowed to answer questions 7, 9, 10, 12, 15, 17, 18 and 19 in their motion for questions to jurors,[22] he would answer each question in the affirmative. Petitioners then excepted to the trial judge's rulings, including the ruling that the veniremen was indifferent, and then

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[22] "7. Have you read any articles in any newspapers or magazines concerning the Brink's case?

"9. Have you read or heard that J. Edgar Hoover, Director of the F.B.I., or Herbert Brownell, Attorney General of the United States, or the Department of Justice has said that the Brink's case had been solved and that these defendants had committed that robbery?

"10. Have you read or heard what J. Edgar Hoover or Herbert Brownell or the Department of Justice has said about how the Brink's case had been solved?

"12. Have you read or heard what J. Edgar Hoover, Herbert Brownell or the Department of Justice has said about the criminal records and records of arrests of these defendants?

"15. Have you read or heard how the Brink's case was solved?

"17. Have you read or heard about the criminal records and records of arrests of these defendants?

"18. Have you read or heard that Specs O'Keefe has pleaded guilty to participating in the Brink's robbery?

"19. Have you read or heard that Specs O'Keefe has named these defendants as those who participated with him in committing the Brink's robbery?"

one of petitioners challenged peremptorily that veniremen. (Tr. 301, 302, 332, 341-344.)

That same procedure was followed whenever a veniremen was held to be indifferent and the Commonwealth was content until all of the petitioners' 262 peremptory challenges had been exhausted. After that, the same procedure was followed except, of course, for the exercise of a peremptory challenge. In all 1104 veniremen were examined in open court. Although 559 admitted to having an opinion as to the guilt or innocence of petitioners, only 426 who testified that they had strong or firmly fixed opinions were excused for prejudice. 239 were excused because of ill health, hardship and other reasons. The Commonwealth exercised 163 peremptory challenges. Petitioners exhausted their 262 peremptory challenges.[23]

Ultimately after petitioners had exhaused their peremptory challenges, 14 veniremen were declared indifferent by the Court and satisfactory to the Commonwealth. Each of the fourteen, with the exception of Jurors Wolusky and Leary, answered in the negative the following questions, the only questions relating to prejudice, put to them by the trial judge: "Have you expressed or formed an opinion as to the guilt or innocence of any of these defendants?" "Are you conscious of any bias or prejudice for or against

[23] Mass. G. L. c. 234, s. 29 (as amended through St. 1955, c. 485, s. 1), read: "Upon the trial of an indictment for a crime punishable by death or imprisonment for life, each defendant shall be entitled to twelve peremptory challenges of the jurors called to try the case, and in other criminal cases each defendant shall be entitled to three such challenges; provided, that each d fendant in a capital case in which additional jurors are chosen under section twenty-six B shall be entitled to one additional peremptory challenge for each additional juror. In every criminal case the commonwealth shall be entitled to as many such challenges as equal the whole numbe: to which all the defendants in the case are entitled. . . ." See now Mass. G. L. c. 234, s. 29 (as amended through St. 1957, c. 335), which was enacted upon the recommendation of the Judicial Council. 1956 Pub. Doc. No. 144, p. 42.

anyone in this case?" "Do you know of any reason that would prevent you from reaching a fair and impartial decision or verdict on the evidence as it will be presented to you here and under the law as the court will give you the law?" (Tr. 1501-1503, 1549-1552, 1562-1564, 1568-1569, 1604-1605, 1606-1607, 1722-1723, 1748-1749, 1829-1831, 1841-1842.) The following colloquy took place in the examination of Juror Wolusky:

"Q. Have you formed or expressed any opinion as to the guilt or innocence of any of these defendants?

"A. I don't have a firm opinion.

"Q. Are you aware of any bias or prejudice for or against anyone in this case?

"A. Not that I know of.

"Mr. Smith: The same objection and exception and challenge for cause for all defendants. Specifically we object and except to Your Honor's ruling that the veniremen stands indifferent because of the statement that he, and I quote, said, 'I don't have a firm opinion,' which indicates he has some opinion.[23a]

"The Court: Very well. When I asked you that question I understood that you would be able to take the oath of a juror, to well and truly try the issues between the Commonwealth and the defendants according to the evidence. That would be uninfluenced in any way by any preconceived notions.

"The Juror: You are right, because I don't convict anyone unless I know the facts and I don't know the facts." (Tr. 1491-1495.)

[23a] The trial judge had ruled that in order to save time the petitioners would not be required to reassert every time their request for leave to conduct a voir dire and their motion for questions to jurors, reintroduce in evidence their affidavits in support of their special pleadings and the five volumes of newspaper articles, and offer to prove that each prospective juror had read about the Brink's case.

The following colloquy occurred in the examination of Juror Leary:

"Q. Have you expressed or formed any opinion as to the guilt or innocence of any of these defendants?

"A. I have a tentative opinion; could be changed.

"Q. If you are accepted as a juror, an oath will be administered to you that you will well and truly try the issues between the Commonwealth and these defendants, according to the evidence, which means that you should serve with an open mind and decide the case purely on the evidence as it will be presented here, uninfluenced by any preconceived notion, ideas, or opinions that you may now have. Do you think you could take that oath and adhere to it faithfully?

"A. I do Your Honor.

"Q. Are you aware of any bias or prejudice for or against anyone in this case?

"A. No, Your Honor.

"Q. Do you know of any reason that would prevent you from reaching a fair and impartial decision or verdict exclusively on the evidence and under the law as the Court will give you the law?

"A. No.

"Q. Mr. Leary, if you are sworn as a juror, you will be instructed by the court that every defendant is presumed to be innocent and it will be your duty to bring in a verdict, return a verdict of not guilty unless you are convinced beyond a reasonable doubt on the evidence and the law that he is guilty. Now do you think that your opinion or whatever notions you have will interfere with carrying out that oath, those instructions?

"A. No Your Honor..." (Tr. 1918-1921.)

In each instance, as already indicated, petitioners challenged for cause: reasserting their request for leave to conduct a voir dire and their motion for questions to jurors, re-introducing in evidence the affidavits in support of their special pleadings and the five volumes of newspaper articles, and making the offer of proof already described. They then excepted to the trial judge's rulings (Tr. 1493, 1502-1503.) In connection with Jurors Wlusky and Leary, petitioners claimed a separate exception because of the trial judge's ruling of indifference despite an indicated opinion. All fourteen were sworn and served as jurors in the case.[24]

Views were taken on August 30, 1956, and the government opened its case on the next day.

While the Commonwealth introduced evidence at the trial sufficient, if believed, to warrant petitioners' convictions as charged, no witness, except for O'Keefe who had previously pleaded guilty to the armed robbery indictment, was able to identify any of the participants.

At no time during the trial did the Commonwealth offer or attempt to offer any evidence touching upon or dealing with any of the following matters, all of which had repeatedly appeared in the newspapers between January 12, 1956 and August 6, 1956 and were issued and caused with calculation by the district attorney, his assistants, other officials of the Commonwealth, and officials of the Department of Justice: petitioners' records of arrest and criminal records; the murder of Carleton M. O'Brien or anyone else from Rhode Island and the connection between his or their murders and the Brink's case; the escape of Elmer "Trigger" Burke and the connection of such escape with anyone of the petitioners or other defendants; the death of George

[24] Two of the jurors, Davenport and Bagge, were withdrawn after all the evidence was in to reduce the 14-man jury to twelve members and were thereupon discharged. (Tr. 5249.)

D. O'Brien and the connection between his death, the Danvers armored car larceny and the Brink's case; the murder or disappearance of John Carlson and its connection with the Brink's case; the importing of "Trigger" Burke and the machine gunning of O'Keefe by "Trigger" Burke and the connection between both events and the Brink's case; the attempted break out of the Charles Street Jail by any of the petitioners; the murder of Morris "Whitey" Hurwitz and the connection between that death and the Brink's case; threats to key Brink's officials or any other government witnesses and the connection of such threats to any of the petitioners; the proposed bombing of O'Keefe's jail cell in order to seal his lips; the murder of a man in Georgetown and the connection between that death and the Brink's case; the execution of five persons because they knew too much about the robbery and their burial in the sands of Cape Cod; the holding of $100,000 by suicide Joseph Venuti and the connection thereof with the Brink's case; the offer to O'Keefe of a substantial sum of money to keep quiet about the Brink's case; the kidnapping of Vincent Costa and the demand for ransom by O'Keefe and Carlson; the burial in water-filled quarries of one or two Massachusetts men who supposedly were slain because they knew too much about the robbery; the tracing of any part of the Brink's loot to Philadelphia where it was deposited in a strong box by a doctor whose license had been revoked; the blonde woman who purportedly saw the Brink's loot "divvied" up; the discovery of several thousands of dollars of the Brink's loot purportedly secreted by O'Keefe; the importing of "Trigger" Burke to Boston to wipe out O'Keefe, the promise to get him out of jail and the promise to support him; admissions by Gusciora; the importing of four waterfront gunmen from New York to silence O'Keefe by death, to intimidate witnesses and to collect defense money from the underworld; the presence of a witness

when Banfield received his share of the loot; the linking of $5,000 worth of coins seized at the time of the arrest of petitioners Faherty and Richardson with the Brink's loot; the arrest of Jordan Perry in Baltimore with $4,822.57 of the Brink's loot which he was engaged to pass; the delivery of $30,000 of the Brink's loot to a South Shore home for circulation throughout the country; the key figure who offered to disclose the details of the handling of the Brink's loot; the murder of William Cameron and the connection between his murder and the Brink's case; the "rubbing out" of William Cameron for tipping off the FBI to the Coleman Street apartment where petitioners Faherty and Richardson were captured; the disappearance of the blonde girl who acted as a go-between for key figures in the Brink's case; the connection which Rhode Island gangsters had with the Brink's case; the discovery on the eve of the trial that a key government witness was missing and was feared slain.

Verdicts of guilty were returned by the jury and petitioners were sentenced as heretofore indicated.[25]

Petitioners appealed to the Supreme Judicial Court of Massachusetts pursuant to Massachusetts G. L. c. 278, ss. 33A-33G, as amended, and filed their respective assignments of error. Among the errors assigned, briefed and argued to the Supreme Judicial Court were numbers 5, 14, and 23[26] (R. 99-100, 102, 104), which raised the first question presented here (whether petitioners were deprived by the Commonwealth of their federal constitutional right to a fair and impartial grand jury); numbers 7, 16, 25, 32-34[27] (R. 100, 102-103, 105, 106-107), which raised the second

[25] Petitioner McGinnis was acquitted by direction of the court under the armed robber and breaking and entering indictments.

[26] The corresponding assignment numbers for the other petitioners may be found commencing at R. 134, 170, 205, 240, 278, 317, 502.

[27] The corresponding assignment numbers for the other petitioners may be found commencing at R. 135, 170, 206, 241, 279, 318, 502.

question presented here (whether petitioners were deprived by the Commonwealth of their federal constitutional right to a fair and at the same time, speedy trial); number 28[28] (R. 105), which raised the third question presented (whether because of the prejudicial, pre-trial publicity the failure of the trial judge to continue the case sua sponte deprived petitioners of their federal constitutional right to a fair and impartial trial); and numbers 35-38, 43 and 43A[29] (R. 107-110), which raised the fourth question presented here (whether because of the prejudicial pre-trial publicity, the failure of the trial judge to question searchingly the prospective jurors about their prejudices, or to allow petitioners to conduct a voir dire deprived petitioners of their federal constitutional right to a fair and impartial trial).

The Supreme Judicial Court affirmed the judgments of the Superior Court. In passing upon the first question presented, the Supreme Judicial Court said that "in Massachusetts, as in England, the grand jury is deemed to be an informing and accusing body, rather than a judicial tribunal." (Appendix A, *infra*, p. 113); that "the indictment is merely an accusation or charge of crime" (Appendix A, *infra*, p. 114); that it was not "necessary that each grand juror shall be free from bias or prejudice" (Appendix A, *infra*, p. 115); that "if anything improper shall be given in evidence before the grand jury, the error may be corrected subsequently upon the trial before the petit jury" (Appendix A, *infra*, p. 115); and that no violation of art. 12 of the Declaration of Rights of the Massachusetts Constitution was disclosed by ground

[28] The corresponding assignment number for the other petitioners may be found commencing at R. 140, 176, 211, 246, 284, 323, 508.

[29] The corresponding assignment numbers for the other petitioners appear at R. 142-146, 178-181, 213-216, 248-252, 286-289, 325-329, 510-516.

1 of petitioners' special pleadings; and that "upon any decisions of the Supreme Court of the United States which have come to our attention, there was no violation of the Fourteenth Amendment[30] (Appendix A, *infra*, pp. 115-116). In dealing with the second and third questions presented, which were considered together, the court below, while acknowledging that prejudicial publicity created by enforcement officials was "indefensible," stated that it did not follow that "the inevitable result is that the defendants must be released, because they can never constitutionally be tried. . . or that these particular indictments should be quashed" (Appendix A, *infra*, p. 117); that the trial judge in June 1956 when the constitutional issues raised by petitioners' first special pleadings were considered, "could reasonably have concluded that its (publicity) effect had abated or would abate by August to an extent sufficient to permit a fair trial, particularly with the care reasonably expected to be taken in selecting the petit jury" (Appendix A, *infra*, p. 118); and that it could not be said that "it was a abuse of discretion to select August 6, 1956, as the trial date"[31] (Appendix A, *infra*, p. 118). The court below, despite state and federal constitutional questions raised

[30] Since the highest state court passed on the first issue raised here, "the statutory requirement that the federal right sought to be vindicated in this Court be one claimed below" has been satisfied. *Raley* v. *State of Ohio*, 360 U.S. 423, 436-437, 79 S.Ct. 1257, 1265.

[31] Petitioners had, of course, seasonably and repeatedly claimed in the Superior Court that the governmentally inspired publicity had deprived them of their federal as well as state, constitutional right to a fair, impartial, and, at the same time, speedy trial (Tr. 53-54, 209-212, 257, 302, 333; R. 78-83). Petitioners had also "repeatedly asserted that no unbiased jury could be empanelled." (Appendix A, hereto, *infra*, p. 121). It was those constitutional issues about which the court below was speaking when it said that even if the publicity had been created by enforcement officials, it did not follow that the "inevitable result is that the defendants must be released because they can never constitutionally be tried . . ." (Appendix A, hereto; *infra*, p. 117).

by assignment numbers 35-38, 43 and 43A, treated the fourth question presented as a matter within the discretion of the trial judge although acknowledging that petitioners had "repeatedly asserted that no unbiased jury could be empanelled" (Appendix A, *infra*, p. 121).

REASONS FOR GRANTING THE WRIT

Trial by press, but a phase of the constitutional issues raised here, has become "one of the worst menaces to American justice." See Jackson, J., concurring in *Shepherd* v. *State of Florida*, 341 U.S. 50, 55, 71 S.Ct. 549, 551. See also, Frankfurter, J., in opinion on denial of certiorari in *State of Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 919-920, 70 S.Ct. 252, 255-256; Frankfurter, J., concurring in *Pennekamp* v. *State of Florida*, 328 U.S. 331, 359-365, 66 S.Ct. 1029, 1043-1046; *Delaney* v. *United States*, 1 Cir., 199 F2d 107, 113; *Singer* v. *State of Florida*, Fla. , 109 So.2d 7, 14.[32] The traditional means which have been employed in this country in an attempt to secure jurors free of the prejudicial effect of pre-trial publicity —precautionary instructions, change of venue and continuance—have neither solved, nor arrested the growth of, the problem, nor guaranteed the accused the fair and impartial jury to which he is constitutionally entitled. *Singer* v. *State of Florida*, Fla. , 109 So.2d 7, 14-17.

In England the problem has been eliminated in large measure by the courts' free use of their power to punish for contempt. See appendix to opinion of Frankfurter, J., on denial of certiorari in *State of Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 921 et seq., 70 S.Ct. 252; *Delaney* v. *United States*, 1 Cir., 199 F.2d 107, 113; Sullivan, *Contempts in Publication* (1940) 113-129. Deterrents to a similar solution in this country have been ascribed to the reluctance of courts to antagonize the press, Sullivan, *Contempts in Publication* (1940) 119; the limitation seemingly imposed upon all courts by the constitutional right

[32] As early as 1915, a chief justice of this Court in an address to the New York Constitutional Convention characterized trial by newspaper as "one of the greatest evils, perhaps the most vicious one." Taft, *Law Reform* (1926) 153.

to freedom of the press, *Bridges* v. *State of California*, 314 U.S. 252, 62 S.Ct. 190; *Pennekamp* v. *State of Florida*, 328 U.S. 331, 66 S.Ct. 1029; *Craig* v. *Harvey*, 331 U.S. 367, 67 S.Ct. 1249;[33] and the restriction placed upon Federal courts by 18 U.S.C. s. 401, *Nye* v. *United States*, 313 U.S. 33, 61 S.Ct. 810. See also Jackson, J., dissenting in *Shepherd* v. *State of Florida*, 341 U.S. 50, 52, 71 S.Ct. 549, 550; *Delaney* v. *United States*, 1 Cir., 199 F.2d 107, 113.

As threatening as the basic problem is, there is a related problem which is even more menacing and constitutes an even greater danger to American criminal justice. That problem arises where, as here, government enforcement officials personally furnish to the press prejudicial, inadmissible evidence or gossip in anticipation of indictment or trial. It is especially menacing when such publicity is calculated and tends to influence and prejudice a grand or trial jury. Such conduct has been described as "reprehensible", a "gross impropriety" and, by the court below, as "indefensible"; yet unfortunately appears to be on the increase.

Recent cases in which there was some evidence or indication of prejudicial publicity instigated by or attributed to government representatives are *Irvin* v. *Dowd*, 359 U.S. 394, 396-397, 79 S.Ct. 825; *Ciucci* v. *State of Illinois*, 356 U.S. 571, 573, 78 S.Ct. 839, 840; *Stroble* v. *State of California*, 343 U.S. 181, 72 S.Ct. 599; *Shepherd* v. *State of Florida*, 341 U.S. 50, 71 S.Ct. 549 (concurring); *Henslee* v. *United States*, 5 Cir., 246 F.2d 190; *Delaney* v. *United States*, 1 Cir., 199 F.2d 107; *People* v. *Hryciuk*, 5 Ill. 2d 176, 125 N.E.2d 61; *People* v. *Murawski*, 394 Ill. 236, 68 N.E.2d 272. See *Basiliko* v. *Maryland*, 212 Md. 248, 129 A.2d 375. Se ealso *Singer* v. *Florida*, Fla. , 109 So. 2d 7, 16-17, in which the court thought the problem of

[33] It should be noted that none of those cases involved jury trials.

sufficient import to discuss even though there was no evidence in that case that the publicity had been governmentally inspired.

When representatives of the government whose prime interest should be that "justice shall be done" feed prejudicial matters to the press, the government itself becomes a "conscious participant" in indictment or trial by press, cf. Frankfurter, J., dissenting in *Stroble* v. *State of California*, 343 U.S. 181, 201, 72 S.Ct. 599, 609. Petitioners submit that where the government itself consciously participates in indictment by press, the government knowingly deprives the person who is under investigation by the grand jury of his federal constitutional right to a fair and impartial grand jury, and where it consciously participates in trial by press, it knowingly impairs, if not completely destroys, the federal constitutional right of one already under indictment to a fair, impartial and, at the same time, speedy trial.[34] It is these contentions and the consequent relief which should be available that this Court is now asked, by the first two questions, to consider. So far as petitioners can determine, these precise issues have never been decided by this Court.[35] These questions, petitioners believe, are of deep and vital concern not only to petitioners but to everyone, cf. Frankfurter, J., dissenting in *Bridges* v. *State of California*, 314 U.S. 252, 282, 62 S.Ct. 190, 203. The remaining two issues involve related ques-

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[34] Articles 11 and 12 of the Declaration of Rights to the Massachusetts Constitution and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

[35] See *Frank* v. *Mangum*, 237 U.S. 309, 35 S.Ct. 582, where this Court rejected as unsound a contention that "when the first attempt at a fair trial is rendered abortive through outside influences, the State, instead of allowing a new trial under better auspices, must abandon jurisdiction over the accused and refrain from further inquiry into the question of his guilt." In that case, no contention was made that the public sentiment and other disorders were inspired by the State.

tions decided by the court below in a way which, petitioners submit, is not in accord with the teachings of this Court.

Before discussing the questions presented here, it might be well to emphasize that much of what was fed by the government to, and reported by, the press was highly prejudicial. It seems clear that it would have been grossly improper for the district attorney to have attempted at the trial (1) to introduce evidence before the jury that petitioners (none of whom testified) had bad criminal or police records, or that petitioners were of unsavory character, or that they had committed other unrelated serious crimes, or that petitioners were linked with the unrelated disappearance, murder, kidnapping or escape from jail, of other criminals, even if factual, *Michelson* v. *United States*, 335 U.S. 469, 475-476, 69 S.Ct. 213, 218-219; *Commonwealth* v. *Stone*, 321 Mass. 471, 473, 73 N.E.2d 896, 898; or (2) to feed the jurors information that some of the petitioners had confessed or had made admissions, or that petitioners had set aside two hundred thousand dollars from the stolen money as a defense fund, or that petitioners were linked with an attempt to murder O'Keefe, the Government's star witness, or with the disappearance of key government witnesses, when the district attorney had no admissible evidence to that effect, *Shepherd* v. *State of Florida*, 341 U.S. 50, 51-52, 71 S.Ct. 549, 550 (dissent). Equally improper would have been any similar attempt by the district attorney to influence the grand jury, *Attorney General* v. *Pelletier*, 240 Mass. 264, 307-310, 134 N.E. 407, 419-420. But as prejudicial as such information would have been at the trial where it might have been "tempered by protective procedures", the prejudice is greater when it reaches the grand jury or petit jury through news accounts, *Marshall* v. *United States*, 360 U.S. 310, 312-313, 79 S.Ct. 1171, 1173.

I. The first question presented here is whether Massa-

chusetts has deprived petitioners of their federal constitutional right to a fair and impartial grand jury; and if so, whether petitioners' convictions should be set aside and the indictments quashed or abated.[36] That issue is based upon petitioners' allegation that the state prosecutor and other state and federal officials, acting collectively and individually, issued, caused and stimulated massive, prejudicial pre-indictment publicity, *calculated and tending to convince the grand jury*, returning the indictments on which petitioners were convicted, of petitioners' guilt and to arouse the grand jury's animosity, indignation and prejudice towards and against petitioners. The allegation, as indicated in the Statement of the Case, was not only supported by affidavit and by literally hundreds of prejudicial newspaper articles, but was also assumed to be true by both the trial judge and the court below.[37] The court below, in holding that there had been no violation of the petitioners' constitutional rights, emphasized that "in Massachusetts, as in England, 'the grand jury is deemed to be an informing and accusing body, rather than a judicial tribunal'" (Appendix A, *infra* p. 113); and that "the indictment is merely an accusation or charge of crime" (Appendix A, *infra*, p. 114). But similar reasons for

[36] A plea in abatement or motion to quash is the proper way for challenging the grand-jury selection, *Cassell* v. *State of Texas*, 339 U.S. 282, 70 S.Ct. 629; *Reece* v. *State of Georgia*, 350 U.S. 85, 76 S.Ct. 167.

[37] As a matter of fact, the Commonwealth conceded on page 9 of the brief which it filed in the court below that its motion to dismiss petitioners' special pleadings could "be treated as recognizing an issue as though raised by a demurrer *ore tenus*." This court must also assume the truth of the allegations for two added reasons: (1) petitioners had offered to prove their allegations and their offer had been refused, cf. *Lambert* v. *State of California*, 355 U.S. 225, 227, 78 S.Ct. 240, 242; and (2) "had there been evidence obtainable to contradict the testimony offered by petitioner(s), . . . the State would (not) have refrained from introducing it," *Pierre* v. *State of Louisiana*, 306 U.S. 354, 361-362, 59 S.Ct. 536-540.

a trial judge's refusal to quash an indictment were rejected in *Pierre* v. *State of Louisiana*, 306 U.S. 354, 356-357, 59 S.Ct. 536, 538.

In Massachusetts, the general rule is that no person shall be held to answer for a felony unless upon indictment by a grand jury, art. 12 of the Declaration of Rights of the Massachusetts Constitution; *Jones* v. *Robbins*, 74 Mass. (8 Gray) 329; *DeGolyer* v. *Commonwealth*, 314 Mass. 626, 627, 51 N.E.2d 251, 252. The Massachusetts grand jury, like its English progenitor and its federal counterpart, is free of technical rules[38] and is sworn to secrecy, to present "no man for envy, hatred, or malice," and to leave unpresented "no man for love, fear, favor, affection or hope of reward," Mass. G.L. (Ter. Ed.) c. 277, s. 5.[39] See *Costello* v. *United States*, 350 U.S. 359, 361-362, 76 S.Ct. 406, 408. While this Court has held that the due process clause of the Fourteenth Amendment does not require state prosecutions to be instituted by indictments of grand juries, *Hurtado* v. *State of California*, 110 U.S. 516, 538, 4 S.Ct. 111, 292; *Kennedy* v. *Walker*, 135 Conn. 262, 273-274, 63 A.2d 589, aff'd. 337 U.S. 901, 69 S.Ct. 1046, and would probably hold, in view of *Costello* v. *United States*, 350 U.S. 359, 76 S.Ct. 406, that the Fourteenth Amendment does not prescribe the kind of evidence on which grand juries must act, this Court has nevertheless indicated that where a state prosecution is initiated by indictment of a grand jury, the grand jury must be free of prejudice and bias. See *Cassell* v. *State of Texas*, 339 U.S. 282, 70 S.Ct. 629, and note especially the Court's statement at p. 282 of 339 U.S. that "*review was sought*

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[38] The court will not inquire whether competent evidence was heard by the grand jury (Appendix A hereto, *infra*, p. 115).

[39] Despite the statute, "it is not . . . necessary that each grand juror shall be free from bias or prejudice . . ." (Appendix A hereto, *infra*, p. 115).

in this case to determine whether there had been a violation by Texas of petitioner's federal constitutional right to a fair and impartial grand jury." (Italics supplied.) See also *Costello* v. *United States*, 350 U.S. 359, 76 S.Ct. 406, where this Court said at p. 363 of 350 U.S.: "An indictment returned by a legally constituted and *unbiased* grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits;" and where Mr. Justice Burton, concurring, said at p. 364: "*I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment*" (italics supplied); and *Lawn* v. *United States*, 355 U.S. 339, 349, 78 S.Ct. 311, 317. Moreover, fairly to be understood from *Delaney* v. *United States*, 1 Cir., 199 F.2d 107, 112, is the proposition that an indictment, which has been returned by a grand jury whose deliberations have been infected by governmentally inspired publicity, is subject to dismissal.

It is difficult to distinguish between the underlying theory of the line of cases, of which *Cassell* is one,[4] holding that a Negro, who has been indicted by a grand jury from which Negroes have been intentionally excluded or in which they have been intentionally included in proportion to their membership in the population, has been denied his constitutional right to a fair and impartial grand jury, and the instant case. If anything, the prejudice here would apt to be more damaging. On the basis of *Cassell*, *Delaney* and reason, it would seem that if a government does see fit to make use of the grand jury process, its grand juries must be, at the very least, free of governmentally inspired prejudice and bias; and that it is fundamentally unfair.

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[4] See, e.g., *Michel* v. *State of Louisiana*, 350 U.S. 91, 76 S.Ct. 158; *Reece* v. *State of Georgia*, 350 U.S. 85, 76 S.Ct. 167.

contrary to the opinion of the court below,[41] to limit an accused, who has been indicted by a grand jury whose deliberations were infected by calculated governmentally issued prejudicial publicity, to the questionable relief of correcting the error "subsequently upon the trial before the petit jury." This Court, in the opinion of petitioners, would probably reverse the judgments of the court below on the ground that Massachusetts has deprived petitioners of their federal constitutional right to a fair and impartial grand jury with the result that the indictments on which petitioners were convicted should be quashed or abated.

II. The second issue which this Court is asked to consider is whether Massachusetts has deprived petitioners of their federal constitutional right to a fair, impartial and, at the same time, speedy trial; and if so, whether petitioners' convictions should be set aside and the proceedings dismissed. That the deliberate denial to a federal prisoner of his right to a speedy trial, guaranteed to him by the Sixth Amendment to the Federal Constitution, entitles him to a dismissal of the prosecution, has been established by *Petition of Provoo*, 17 F.R.D. 183, aff'd. *sub nom. United States* v. *Provoo*, 350 U.S. 857, 76 S.Ct. 101; cf. *Pollard* v. *United States*, 352 U.S. 354, 361-362, 77 S.Ct. 481, 485-486.[42] But whether a similar denial to a state prisoner constitutes a violation by the state of the due process clause of the Fourteenth Amendment has not as yet been decided by this Court. However, implicit in *Irvin* v. *Dowd*, 359 U.S. 394, 79 S.Ct. 825, is the conclusion that a state prisoner, who because of prejudicial publicity fails to receive a fair trial, has not been accorded the due process

[41] Appendix A hereto, *infra*, p. 115.

[42] Provoo employed a motion to dismiss to accomplish what petitioners' sought by their motions to quash, pleas in abatement and pleas in bar. Under Rule 12(a) of the *Federal Rules of Criminal Procedure*, special pleas were abolished and their place taken by a motion to dismiss.

of law guaranteed him by the Fourteenth Amendment. Because the right to a speedy trial is not only closely interwoven with the right to a fair trial, but is also, for the reasons expressed in *Petition of Provoo*, 17 F.R.D. 183, a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental", *Snyder* v. *Commonwealth of Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332; *Palko* v. *State of Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, it is probable that this Court would also hold that a state which has deliberately prevented a defendant from securing a speedy trial has violated constitutional due process.

That this Court would so hold is, of course, not decisive of the issue raised here for still to be answered in the affirmative, are three subsidiary questions: (1) did Massachusetts enforcement officials "deliberately" or with calculation feed newspapers with prejudicial publicity; (2) did such prejudicial publicity, stimulated by Massachusetts enforcement officials, deny petitioners a fair and impartial trial; and (3) did the prejudicial publicity, stimulated by Massachusetts enforcement officials, continue or make an impact for so long a period of time that it became impossible for petitioners to obtain a "speedy" trial within the constitutional meaning of that word.

(1) It is clear that the district attorney and his assistants and other state and federal officials, acting together, issued, caused and stimulated massive, prejudicial pre-trial publicity, calculated and tending to convince any trial jury which might be selected to try petitioners of petitioners' guilt and to arouse such jury's animosity, indignation and prejudice towards and against petitioners; and that such prejudicial publicity continued right up to the date of trial. Not only did petitioners' first and second special pleadings and their first and second affidavits so allege and the newspaper articles contained in Exhibits A, B, C, D, and E so

demonstrate, but "the trial judge assumed the truth thereof."[43] The court below proceeded on the same assumption except that it decided, for some unknown reason, that the trial judge on June 4, 1956, the last day of the hearing on petitioners' first special pleadings, "could reasonably have concluded that its effect *had abated* or would abate in August to an extent sufficient to permit a fair trial."[44] (Italics supplied.) While the conclusions reached by the Supreme Judicial Court for the Commonwealth of Massachusetts "are entitled to great respect", this Court must, nevertheless, make "independent inquiry and determination of the disputed facts." *Pierre v. State of Louisiana*, 306 U.S. 354, 359, 59 S.Ct. 536, 538-539; *Cassell v. State of Texas*, 339 U.S. 282, 283, 70 S.Ct. 629-630; *Napue v. State of Illinois*, 360 U.S. 264, 271-272, 79 S.Ct. 1173, 1178-1179. Such an inquiry would, petitioners submit, show (1) by Ex. C, which was introduced in evidence on May 29, 1956, at the commencement of the hearing on petitioners' first special pleadings, that the prejudicial publicity had continued during the period from February 15, 1956 (the last date of the period covered by Exs. A and B) to May 29, 1956; and (2) by petitioners' second special pleadings, second affidavit and Exs. D and E, which were filed and introduced in evidence on August 6, 1956, when the trial began, that the prejudicial publicity had continued right up to the start of the trial.

That the prejudicial pre-trial publicity denied petitioners a fair and impartial trial seems equally clear. First of all, petitioners' first and second special pleadings, supported by their affidavits and Exs. A-E, inclusive, alleged that the prejudicial publicity, which had been

[43] Furthermore, the Commonwealth conceded on page 9 of the brief which it filed in the court below that its motion to dismiss petitioners' special pleadings could "be treated as recognizing an issue as though raised by a demurrer *ore tenus*."

[44] Appendix A hereto, *infra*, p. 118.

governmentally instigated, was calculated and did tend to convince "the public in general and any petit jury which may be selected in the future to try this indictment in particular, of the guilt of each defendant, and to arouse and maintain their animosity, indignation and prejudice towards and against each of the said defendants." The trial judge unquestionably, and the court below apparently assumed the truth of those allegations, although the court below did determine erroneously, petitioners believe, that the trial judge "could reasonably have concluded (on June 4, 1956, when he passed upon petitioners' first special pleadings) that its effect had abated or would abate in August to an extent sufficient to permit a fair trial."[45] Secondly, the trial judge's action in directing that 2,000 persons be summoned for possible jury duty in this case demonstrated that he himself realized that because of the prejudicial publicity he would experience considerable difficulty in selecting impartial jurors. Thirdly, apart from the fact that it was likely that all of the veniremen had read or heard the extrajudicial reports, *Holt* v. *United States*, 218 U.S. 245, 251, 31 S.Ct. 2, 5; *Griffin* v. *United States*, 3 Cir., 295 Fed. 437, 440; *Delaney* v. *United States*, 1 Cir., 199 F.2d 107, 109-116; *Mayer* v. *Cadwalader*, E.D. Pa., 49 Fed. 32, 36; *Commonwealth* v. *Trefethen*, 157 Mass. 180, 196, 31 N.E. 961, 967; *People* v. *Murawski*, 394 Ill. 236, 241, 68 N.E.2d 272, petitioners had offered to prove that each venireman had read or heard such prejudicial publicity and that offer had been rejected. Petitioners submit that it should be assumed that all of the veniremen had read or heard such prejudicial reports, *Pierre* v. *State of Louisiana*, 306 U.S. 354, 361-362, 59 S.Ct. 536, 540; *Lambert* v.

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[45] Appendix A hereto, *infra*, p. 118. In addition, Commonwealth conceded on page 9 of the brief which it filed in the court below that its motion to dismiss petitioners' special pleadings "could be treated as recognizing an issue as though raised by a demurrer *ore tenus*."

State of California, 355 U.S. 225, 227, 78 S.Ct. 240, 242. Finally, the voir dire examinations of 1104 prospective jurors, conducted by the trial judge in a manner, petitioners say, not especially designed to elicit the existence of prejudice, forcefully demonstrated the effect of the publicity. Four hundred twenty-six (426) veniremen insisted that they had strong or firmly fixed opinions; and were, of course, excused for prejudice. One hundred thirty-three (133) other veniremen, including two who served on the jury returning guilty verdicts, admitted having opinions of varying degrees, but testified that they could decide the case purely on the evidence. Their statements that they would not be influenced by any preconceived opinions were apparently accepted as conclusive by the trial judge (but see Black, J., dissenting in *Dennis* v. *United States*, 339 U.S. 162, 176, 70 S.Ct. 519, 527; *Singer* v. *State of Florida*, Fla. 109 So.2d 7); even though many of them were undoubtedly not so endowed with such a sense of detachment that they could exclude the unconscious influence of their preconceptions as to probable guilt, *Delaney* v. *United States*, 1 Cir., 199 F.2d 107, 112-113; *People* v. *Hryciuk*, 5 Ill.-2d 176, 183-185, 125 N.E.2d 61,). Two hundred thirty-nine (239) veniremen were excused for ill health, hardship and other reasons, ofttimes before they were questioned about prejudice or bias. The remaining prospective jurors, including the ten other jurors participating in the return of the verdicts denied the existence of any opinion or bias. Their denials were apparently accepted as conclusive although "persons most affected with bias or prejudice are sometimes the least sensible of it." *Commonwealth* v. *Trefethen*, 157 Mass. 180, 195, 31 N.E. 961, 967; cf. *Globe Newspaper Company* v. *Commonwealth*, 188 Mass. 449, 453, 74 N.E. 682, 684. All in all, it seems quite apparent that the pre-trial publicity prevented a fair and impartial trial during the period of trial

(August 6, 1956 to October 5, 1956), *Irvin* v. *Dowd*, 359 U.S. 394, 79 S.Ct. 825; cf. *Marshall* v. *United States*, 360 U.S. 310, 79 S.Ct. 1171. Furthermore, unlike *Stroble* v. *State of California*, 343 U.S. 181, 72 S.Ct. 599; *United States* v. *Handy*, 351 U.S. 454, 76 S.Ct. 965, the issue of prejudicial publicity in the instant case was not an afterthought. As a result, petitioners deliberate failure to move for a continuance or for a change of venue cannot be considered as particularly significant.[46] The right to move for a continuance or for a change of venue is given for the accused's benefit and at his option. A defendant is not obliged to forego his constitutional right to a speedy trial in the vicinity where the crime was alleged to have been committed in order to secure an impartial trial. Cf. *Delaney* v. *United States*, 1 Cir., 199 F.2d 107, 116.

(3) The court below, relying upon *Delaney* v. *United States*, 1 Cir., 199 F.2d 107, 112, took the view that even if the prejudicial publicity had been created by enforcement officials, it did not follow that "the inevitable result is that the defendants must be released, because they can never constitutionally be tried . . . or that these particular indictments should be quashed" (Appendix A, *infra*, p. 117). Overlooked, however, was the vital distinction between the basis for Delaney's motion to dismiss and petitioners' position. Delaney sought dismissal on the ground that the prejudicial publicity inspired by a legislative committee would prevent a fair trial "*at any time within the foreseeable future*", 199 F.2d 107, 112. Petitioners' contention was entirely different; they argued that the govern-

[46] Petitioners had consistently maintained that there was no county in Massachusetts in which the residents thereof had not been prejudiced and that consequently a change of venue would be meaningless (Tr. 178); and that they would not waive their constitutional right to a speedy trial even though the trial judge indicated that such a waiver was a prerequisite to his consideration of any request for a continuance (Tr. 209-212).

mentally instigated publicity would prevent a fair trial *at any time during the period within which they could have obtained a constitutionally speedy trial.* (Appendix A hereto, *infra*, p. 117.)

Whether a particular delay in providing an accused with a fair and impartial trial amounts to a constitutional deprivation of rights depends upon the circumstances. See, e.g., *Pollard* v. *United States*, 352 U.S. 354, 361, 77 S.Ct. 481, 486. Here six of the petitioners were remanded to jail on January 16, 1956, when they were arraigned because of an inability to furnish what they submit was excessive bail;[37] the other two were confined for the same reason on May 17, 1956, when they were arraigned. At the time of their arraignment, six years had elapsed since the commission of the crimes with the result that there was a strong possibility that any witnesses who might have proved their innocence had long since disappeared or forgotten the circumstances. It must have been evident even to the government's representatives that any delay in putting petitioners to trial could only prolong petitioners' preliminary imprisonment because of an inability to raise bail, intensify the anxiety and fear which all prisoners awaiting trial must experience, and increase the possibility of loss of necessary witnesses. And yet the government, by feeding the press with prejudicial publicity calculated and tending to convince any petit jury which might be selected to try petitioners of petitioners' guilt, embarked upon a course of action which certainly placed petitioners on the horns of a dilemma if the relief sought should not be, as the court below concluded, available. Petitioners could avoid the evils of delay by foregoing a fair trial; or

[37] Petitioners applied to the Superior Court for a writ of habeas corpus contending that the bail under which they were held was excessive. Their applications were denied. See, e.g., Superior Court for Suffolk County, Civil Docket Nos. 500211-500213.

petitioners could, if they requested and the trial judge granted a continuance, obtain a fair trial at some distant date when it might be said with reasonable certainty that the prejudicial effects of the publicity had worn off, but only if petitioners would remain in custody while awaiting trial,[48] continue to live under the sword of Damocles, and run increasingly greater risks that their witnesses might become unavailable or lose their memories—the very evils which the constitutional requirement of a speedy trial seeks to correct. *See Petition of Provoo*, 17 F.R.D. 183, 198; *Commonwealth* v. *Hanley*, 1958 Mass. Adv. Sh. 653, 655, 149 N.E.2d 608, 610.

In the instant case, petitioners were prevented, as already shown, from securing a fair and impartial jury when the trial took place, (August 6, 1956 to October 5, 1956), or during any prior period by the deliberate[49] actions of the government; and unquestionably could not have obtained a fair and impartial jury at any time immediately thereafter. In the circumstances, it would seem that petitioners have been denied their federal constitutional right to a fair, impartial and, at the same time speedy, trial; and that consequently, the convictions should be set aside and the proceedings dismissed.[50] Assuming arguendo that it

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[48] Mass. G. L. (Ter. Ed.) c. 277, s. 72 provides: "Whoever is held in custody upon an indictment shall, if he requires it, either be tried at the sitting of the court next after the expiration of six months from the time when he was imprisoned or be bailed upon his own recognizance, unless the court finds that the witnesses on behalf of the government have been enticed or kept away or have been detained and prevented from attending the court by illness or inevitable accident."

[49] Here the word "deliberate" is used in the sense that it was employed in *Petition of Provoo*, 17 F.R.D. 183.

[50] Petitioners also believe that even if the prejudicial publicity had not been governmentally inspired, the state was, nevertheless, constitutionally obliged (*Bridges* v. *State of California*, 314 U.S. 252, 62 S.Ct. 190; *Pennekamp* v. *State of Florida*, 328 U.S. 331, 66 S.Ct. 1029; *Craig* v. *Harvey*, 331 U.S. 367, 67 S.Ct. 1249, notwithstanding,) to stop the continuation of such publicity in order to provide pet

could not be said that petitioners were deprived of a fair and impartial trial within that period of time, "whatever that might be, during which a trial, properly called speedy, might be had."[51] petitioners have, as will be shown, been denied their federal constitutional right to a fair and impartial trial, with the result, in any event, that their convictions should be set aside.

III. The third question presented here is whether the prejudicial publicity prevented a fair and impartial trial; and if so, whether petitioners' convictions should be set aside. Assuming without conceding, that Massachusetts cannot be said to have denied petitioners their constitutional right to a speedy trial, petitioners are probably not entitled to a dismissal. Nevertheless, Massachusetts had the constitutional obligation to provide petitioners with a fair and impartial trial. *Irvin* v. *Dowd*, 359 U.S. 394, 79 S.Ct. 825. This, as has already been demonstrated, Massachusetts did not do. See, e.g., *Irvin* v. *Dowd*, 359 U.S. 394, 79 S.Ct. 825; *Heaslett* v. *United States*, 5 Cir., 246 F.2d 199; *Jaglick* v. *United States*, 5 Cir., 214 F.2d 950; *Delaney* v. *United States*, 1 Cir., 199 F.2d 107; *People* v. *Bryciak*, 3 Ill. 2d 174, 125 N.E.2d 61; *People* v. *Karawski*, 394 Ill. 236, 68 N.E.2d 372; *Basilika* v. *Maryland*, 212 Md. 218, 131 A.2d 737. See also *Marshall* v. *United States*, 360 U.S. 310, 79 S.Ct. 1171. In this connection, it should be noted that petitioners were denied the opportunity to conduct any examination of prospective jurors on voir dire, cases are *Stroble* v. *State of California*, 343 U.S. 181, 72 S.Ct. 599; *United States* v. *Haudy*, 351 U.S. 454, 76 S.Ct.

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tioners with a fair and impartial trial. This, the trial judge, could have done on his own motion, or upon motion of the district attorney, by the initiation of contempt proceedings, *Telegram Newspaper Company* v. *Commonwealth*, 172 Mass. 294, 52 N.E. 445; *Globe Newspaper Company* v. *Commonwealth*, 188 Mass. 449, 74 N.E. 682.

[51] Appendix A hereto, *infra*, p. 117.

965, and at no time expressed satisfaction with the jury selected to try them, compare *United States* v. *Handy*, supra.

Nor can Massachusetts' failure be justified or excused merely because petitioners neither sought a change of venue nor requested a continuance. First of all, the contention that the prejudicial publicity had prevented a fair trial was not, as in *Stroble* v. *State of California*, 343 U.S. 181, 72 S.Ct. 599; *United States* v. *Handy*, 351 U.S. 454, 76 S.Ct. 965, an afterthought. Second, there was no reason to believe that there was any place in Massachusetts which had escaped the "fall out" of the prejudicial publicity. *Singer* v. *State of Florida*, Fla. 109 So.2d 7. Third, it cannot be seriously argued that petitioners would only be entitled to a fair trial if they would request a continuance to some uncertain future date when it might be said that the prejudicial effects of the publicity had sufficiently faded, and would agree, if their request were granted, to continue to languish in jail, remain on the tenterhooks of their uncertain fate, and run greater risks that they would lose their witnesses for one reason or another.[52] Certainly petitioners are entitled, as are all prisoners, to all three of the constitutional guarantees—the right to a speedy, fair and local trial; and they need not surrender the first and third of those rights in order to secure the second. Cf. *Delaney* v. *United States*, 1 Cir., 199 F.2d 107, 116.

In the circumstances of the instant case, it would seem that Massachusetts has denied petitioners their constitu-

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[52] Petitioners had consistently maintained that there was no county in Massachusetts in which the residents thereof had not been prejudiced and that consequently a change of venue would be meaningless (Tr. 178); and that they would not waive their constitutional right to a speedy trial even though the trial judge indicated that such a waiver was a prerequisite to his consideration of any request for a continuance (Tr. 209-212).

tional right to a fair and impartial trial and that their convictions should be set aside.

IV. The fourth issue raised here is whether, in view of the massive, sustained, prejudicial, pre-trial publicity, the refusal by the trial judge to question prospective jurors searchingly as to their opinions, or to permit petitioners to conduct a voir dire, deprived petitioners of their federal constitutional right to a fair and impartial trial, especially where petitioners had contended and offered to prove that all of the prospective jurors had been prejudiced; and if so, whether petitioners' convictions should be set aside. If, in the light of the record, there is no reasonable doubt as to whether the veniremen, particularly those selected to serve on the jury, should be presumed to have read or heard the prejudicial publicity, this issue becomes academic and may be disregarded. If, on the other hand, it can be argued that notwithstanding the allegations of petitioners' first and second special pleadings and their affidavits and exhibits in support thereof, logic, petitioners' offer of proof, and what transpired at the voir dire examination, petitioners have failed to establish that the veniremen, particularly those chosen to serve on the jury, had read or heard the prejudicial publicity, then this issue becomes important. The voir dire examination of the prospective jurors, conducted by the trial judge in a manner not especially designed to elicit the existence of prejudice, forcefully demonstrated the effect of the publicity and the need to exercise extraordinary care in the selection of the jury. Such an examination should have sought to elicit: (1) whether those veniremen, including the two serving on the jury returning the guilty verdicts, who testified that they would not be influenced by their preconceptions as to petitioners' guilt or innocence, were in fact endowed with such a sense of detachment that they could exclude the unconscious influence of their preconceptions, *Delaney*

v. *United States*, 1 Cir., 199 F.2d 107, 112-113; *People* v. *Bruciak*, 5 Ill. 2d 176, 183-185, 125 N.E.2d 61; and (2) whether those veniremen, including the ten serving on the jury, who denied the existence of any opinion or bias, were merely insensible of it; cf. *Commonwealth* v. *Trefethen*, 157 Mass. 180, 195, 31 N.E. 961, 967; *Globe Newspaper Company* v. *Commonwealth*, 188 Mass. 449, 453, 74 N.E. 682, 684. Instead the trial judge refused to permit petitioners to conduct the voir dire examination of prospective jurors, refused to put the questions listed in petitioners' motion for questions to each prospective juror, and refused to question any prospective juror beyond the statutory questions provided by G.L. (Ter.Ed.) c. 234, s. 28,[53] except when the prospective juror admitted to an opinion and then only asked whether that prospective juror could decide the case purely on the evidence as it would be presented in court uninfluenced by any preconceived opinions. The trial judge thus effectively denied petitioners the opportunity to prove bias. It has been said that "preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial trial", *Dennis* v. *United States*, 339 U.S. 162, 171-172, 70 S.Ct. 519, 523; and it has been held that the denial of such an opportunity is reversible error, *Morford* v. *United States*, 339 U.S. 258, 70 S.Ct. 586. Although both of those cases involved federal prosecutions, there is no reason to suppose that their reasoning would not apply to a prosecution by a state. As a result, petitioners believe that their convictions should be set aside.

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[53] Appendix A hereto, *infra*, p. 120.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL T. SMITH
MANUEL KATZ
203 Washington Street
Boston 8, Massachusetts
Attorneys for Petitioners
Pino, McGinnis and Costa
ROBERT DEGIACOMO
10 State Street
Boston, Massachusetts
Attorney for Petitioner Maffie
LAWRENCE O'DONNELL
818 Adams Street
Dorchester, Massachusetts
Attorney for Petitioners
Geagan, Richardson and Faherty
HENRY SONTAG
31 Milk Street
Boston, Massachusetts
Attorney for Petitioner Baker

Appendix A

Copies of The Opinion and Judgment of the Court Below

Opinion

COMMONWEALTH *v.* MICHAEL VINCENT GEAGAN & others (and twelve companion cases[1]).

WILKINS, C.J. On January 17, 1950, there was a robbery at 165 Prince Street, Boston, the premises of Brink's Incorporated, a company engaged in the transportation of money and valuables. The amount taken was $1,219,000. Eight defendants have been convicted on various indictments growing out of that robbery, and bring these cases here on appeals pursuant to G. L. c. 278, §§ 33A-33G, as amended, which are accompanied by a summary of the record, a transcript of the evidence, and their respective assignments of error.

The eight defendants are Geagan, McGinnis, Faherty, Pino, Richardson, Maffie, Costa, and Baker. Case number 99 is an indictment in three counts for robbery while armed against these eight, one Gusciora and one Banfield (both deceased before trial), and one O'Keefe (who pleaded guilty to that indictment and testified for the Commonwealth). The indictment in case number 100 charges the same persons with breaking and entering in the nighttime with intent to commit robbery. In these two cases a verdict of not guilty was directed for McGinnis, and the other seven defendants were convicted. All eight defendants were convicted on the indictment in case number 101, charging conspiracy to steal. McGinnis also was convicted

[1] Of the companion cases two are entitled *Commonwealth v. Michael Vincent Geagan & others*, and ten are entitled *Commonwealth v. Joseph F. McGinnis.*

ten cases against him alone; case number 145, an indictment charging him with receiving stolen goods; case number 147, an indictment in ten counts, charging him with being an accessory before the fact to breaking and entering in the nighttime with intent to commit a felony; and cases number 148 to 153, inclusive, 156, and 157, eight indictments, each in three counts, charging him with being an accessory before the fact to armed robbery.

There were returned many more indictments than the number tried. In the defendants' brief the total is given as 158 indictments, containing 496 pages. To these the defendants filed a large number of special pleadings, much too extensive helpfully to be set forth at length. It will be convenient to describe them as summarized in the defendants' brief. Each defendant filed to each indictment in which he was named as a defendant a motion to quash, a plea in abatement, and a plea in bar, and in support of each an affidavit to which there were seven exhibits. Each special pleading concluded with prayers that the Commonwealth be ordered to file a replication "or other answer"; that thereafter the special pleading be set down for hearing; and that the indictment be barred, abated, or quashed, as the case might be. Each defendant claimed a trial by jury on factual issues which he contended were raised by grounds 1, 2, 3, and 6 of each special pleading and its accompanying affidavit. All issues presently material were sought to be raised by each such plea and motion.

Ground 1 alleged that the indictment was returned in violation of art. 12 of the Declaration of Rights of the Constitution of the Commonwealth, G. L. (Ter. Ed.) c. 277, of the Fourteenth Amendment to the Constitution of the United States, and 18 U.S.C. (1952) § 241. The supporting allegations were that prior to the commencement of the grand jury proceedings the district attorney, his assistants and investigators, "other officials of the Commonwealth,"

the Federal Bureau of Investigation, and the Federal Department of Justice "issued and caused or permitted to be issued without denial, refraction, minimization or suppression . . . news releases and statements setting forth in great detail: that the so called Brink's robbery had unequivocally been solved; that the said defendants together with other defendants had unequivocally planned and committed the so called Brink's robbery; how the robbery was solved; how the robbery was planned and committed by the said defendants together with the other defendants; the criminal record and so called background data of each of the defendants; and linking the disappearance, death or murder of others and other crimes with the so called Brink's robbery and the said defendants"; that "such releases and statements appeared under large and sensational headlines and in great detail in every daily newspaper published in Boston and in every, or nearly every, daily newspaper published not only elsewhere in Massachusetts, but throughout the nation"; that "such releases and statements, or detailed summaries thereof, were repeatedly broadcast and televised over radio and television stations located in Massachusetts, as well as over national hook ups and seen in Massachusetts"; and that such "widespread and sensational publicity" was calculated to and did tend to convince the public, in general, and the grand jury, in particular, of the guilt of each of the defendants and to arouse their animosity, indignation and prejudice towards and against each of the said defendants."

Ground 2 alleged that the return of the indictment was repugnant to art. 12, to c. 277, § 5, and to the Fourteenth Amendment because "unauthorized persons were present in the grand jury room during the proceedings and deliberations of the grand jury returning this indictment."

Ground 3 alleged that the return of the indictment was

[illegible] to the same provisions as in ground 2, because "prior to, during, and subsequent to, the proceedings conducted by the grand jury returning this indictment" the district attorney, his assistants and investigators, other officials of the Commonwealth, the Federal Bureau of Investigation, and the Federal Department of Justice violated the secrecy of the proceedings "by issuing and causing or permitting to be issued, news releases and statements disclosing what witnesses summoned before the grand jury would testify to, were then testifying to, or had testified to."

Ground 6 alleged that the defendants "are unable to secure a fair and at the same time speedy trial" as guaranteed by arts. I, 11, and 12 of the Declaration of Rights, the Fourteenth Amendment, and 18 U.S.C. (1952) § 241. The supporting allegations as to statements since the return of the indictment are similar to those made in ground 1, with additional statements as to "what Joseph 'Specs' O'Keefe, one of the defendants who has heretofore pleaded guilty, or a member of his family . . . said implicating the defendants not only in the Brink's robbery but in other crimes including murder, kidnapping, the escape of 'Trigger' Burke[1] and larceny; how the said Joseph 'Specs' O'Keefe has stated that a $200,000 defence fund had been established by the defendants; how the said Joseph 'Specs' O'Keefe has accused other of the defendants of stealing from him his share of the Brink's robbery loot; how part of the loot had been or was about to be recovered; where the bodies of those supposedly murdered by the defendants had been, or were suspected of being, buried; and how [illegible] defendants had confessed"; that such "releases and statements have frequently appeared in magazines having substantial circulation in Massachusetts and throughout

[1] See *Commonwealth* v. *Locke*, 338 Mass. [illegible], Mass. Adv. Sh. (1959) 459.

the nation"; and that the "news releases and statements and the widespread publicity given them have been calculated to and tend to convince the public in general and any petit jury which may be selected in the future to try this indictment, in particular, of the guilt of each defendant, and to arouse and maintain their animosity, indignation and prejudice towards and against each of the said defendants."

Before trial on the merits the issues raised by the three kinds of special pleadings were considered in the Superior Court on representative papers filed in certain of the cases. This was done for convenience and without objection. While there was no confusion in the Superior Court, these matters, coming here on a lengthy stenographic transcript of the hearing and without copies of all the papers, present themselves to us in time consuming fashion. The judge took up these issues first upon the motions to quash, all of which were denied, and then up the pleas in abatement, and finally upon the pleas in bar. He ultimately extended his earlier rulings upon the motions to the pleas, all of which were overruled or disproved.

As the substance and not the name of a pleading controls (*Commonwealth* v. *Wakelin*, 230 Mass. 567, 571; *E. S. Parks Shellac Co.* v. *Jones*, 265 Mass. 108, 110; *Toy* v. *Green*, 319 Mass. 354, 357), we shall consider the several grounds of the pleadings which we have summarized above, under the forms of procedure to which their substance is appropriate.

1. A motion to quash is confined to taking objection to an indictment "for a formal defect apparent on the face thereof." G. L. (Ter. Ed.) c. 278, § 17.[1] It is the equivalent

[1] "An objection to a complaint, indictment or other criminal process for a formal defect apparent on the face thereof shall be taken by demurrer or by motion to quash, assigning specifically the objections relied on, before a judgment has been rendered by a district court or a trial justice, or before a jury has been sworn in the superior court."

of a demurrer. *United States* v. *Slobodkin*, 48 F. Supp. 913, 915 (D. Mass.). None of the objections was of this character. No argument is made that they were. The motions to quash were rightly denied.

2. The proper purpose of a plea in bar is to set up a ground, not open under a plea of not guilty, which is an absolute defence, not only at the time of filing but for all time. Examples of appropriate pleas in bar are former acquittal, former conviction, and pardon. *United States* v. *Murdock*, 284 U.S. 141, 151. *United States* v. *Brodson*, 234 F.2d 97, 99 (7th Cir.). *State* v. *Evjue*, 253 Wis. 146, 151-152. Bishop, New Criminal Procedure (2d ed.) § 742, 805-809. 14 Am. Jur., Criminal Law, § 262. 22 C. J. S., Criminal Law, § 436. To these may be added the statute of limitations. *United States* v. *Goldman*, 277 U.S. 229. *Capone* v. *Aderhold*, 65 F.2d 130, 131 (5th Cir.). *United States* v. *Franklin*, 188 F.2d 182, 186 (7th Cir.). None of the foregoing defences was raised. The defendants' plea in substance that they cannot be tried on the present indictments will be considered under their pleas in abatement.

3. Ground 2, alleging the presence of unauthorized persons in the grand jury room, was matter in abatement. *Lebowitch, petitioner*, 235 Mass. 357, 362. This was properly raised by plea in abatement, to which there was no necessity for a replication by the Commonwealth. *Commonwealth* v. *Kozlowsky*, 238 Mass. 379, 385, 391. It was not error for the trial judge not to require the Commonwealth to file a demurrer or replication to the pleas in abatement, the only special pleadings now material. As was said in the case last cited, "In the absence of express admission, the matters stated in the plea in abatement were at once in issue" (page 385).

The judge rightly ruled that this ground was valid in law. *Jones* v. *Robbins*, 8 Gray, 329, 343-344. *Commonwealth* v. *Harris*, 231 Mass. 584. *Opinion of the Justices*,

232 Mass. 601. He then ruled against it on the basis of the affidavit, which was by counsel and stated that on January 13, 1956, "O'Keefe, accompanied by Captain Wilson of the Boston homicide squad, appeared before the grand jury of Suffolk County." At the hearing on the special pleadings counsel for the defendants informed the court that the only source of the contents of the affidavits was the press. Copies of Boston newspapers dated between January 12 and February 9, 1956, were offered by the defendants and admitted as exhibits at the hearing upon the special pleadings. No newspaper has been pointed out to us which sustains this assertion. The quotation above does not.

It is not correct to contend, as to the defendants, that the judge resolved this issue as one of fact. In making his ruling the judge stated that he was not ruling that the issue should be tried before him first, and then, after he was satisfied, before a jury. He said, "All I am ruling is that if you have any evidence that any unauthorized person was present wrongfully before the grand jury . . . this ground will be sufficient. Now, unless you have testimony to that effect, the court is going to deny this particular ground. The court is not going to permit the defendants to go into a fishing expedition on a mere allegation of counsel without any testimony to back it up."

As the judge was then considering the motions to quash, he referred to the affidavits, which, under Rule 46 of the Superior Court (1954),[1] were applicable only to motions. But his consideration of the same question under the pleas in abatement was subject to a statute of similar import: "The court may refuse to receive a plea in abatement or

[1] "The court need not hear any motion, or opposition thereto, grounded on facts, unless the facts are verified by affidavit, or are apparent upon the record and files, or are agreed and stated in writing signed by the attorneys for the parties interested."

other dilatory plea to an indictment until its truth has been proved by affidavit or other evidence." G. L. (Ter. Ed.) c. 277, § 74.

4. Ground 3, alleging violation of the secrecy of the grand jury proceedings, by the issuing by State and Federal officials of statements disclosing what witnesses summoned before the grand jury would testify or had testified, is likewise matter in abatement.

When ground 3 was first taken up by the judge on the motions to quash, he ruled that the affidavits did not satisfy the requirements of Rule 46 of the Superior Court, (1954); and that in so far as he had any discretion to hear the motions upon the affidavits, or other evidence, he refused to do so, because, assuming that the affidavits were in proper form and substantiated the allegations, and assuming the facts to be true, as matter of law the allegations did not give sufficient grounds for quashing the indictments.

There was no error as to ground 3. No case has been cited or discovered by us which holds that such publicity is a violation of the secrecy of the grand jury room. In Massachusetts, as in England, "the grand jury is deemed to be an informing and accusing body, rather than a judicial tribunal," and the only pertinent statute, which we have, defining their duties is that prescribing their oath of office.[1] *Commonwealth* v. *Woodward*, 157 Mass. 516, 517. *Commonwealth* v. *Harris*, 231 Mass. 584, 586. *Commonwealth* v. *Ventura*, 294 Mass. 113, 120. See *Commonwealth*

[1] The oath is found in G. L. (Ter. Ed.) c. 277, § 5: "You, as grand jurors, . . . do solemnly swear that you will diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge; the commonwealth's counsel, your fellows' and your own, you shall keep secret; you shall present no man for envy, hatred or malice, neither shall you leave any man unpresented for love, fear, favor, affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God."

v. *Hill*, 11 Cush. 137, 139-140; *Commonwealth* v. *Mead*, 12 Gray, 167, 170.

In *Commonwealth* v. *McNary*, 246 Mass. 46, and *Commonwealth* v. *Chmielinski*, 246 Mass. 55, convictions for contempt of court were upheld against the defendants, who had sent to the grand jurors letters which, it was held, could be construed as attempts to interfere with the grand jurors' consideration of matters in which the respective defendants were interested adversely to the return of any indictment. The *McNary* case contains much of interest respecting the duties of the grand jury but nothing which is an authority that the present indictments should be abated. See *Attorney Gen.* v. *Pelletier*, 240 Mass. 264, 307-310.

3. There likewise was no error as to ground 1, which sought to invalidate the indictments because of the publicity outlined above. In *Commonwealth* v. *Woodward*, 157 Mass. 516, *supra*, it was held that a plea in abatement was rightly overruled which raised "the question whether an indictment is to be held bad because one of the grand jurors by whom it was found, being otherwise competent and qualified to serve, had before the meeting of the grand jury made a personal investigation into the guilt of the accused, and had secreted himself in a room with an officer for the purpose of listening to declarations and admissions made by the accused concerning the crime, and had heard such declarations and admissions, and had listened to statements of officers to the effect that the accused was guilty, and had thereupon formed an opinion, and believed him to be guilty before and at the time of the investigation of the case by the grand jury" (pages 516-517). At pages 518-519, it was said, "The indictment is merely an accusation or charge of crime. For the protection of the people against unreasonable accusations, there are constitutional and statutory provisions that, with certain exceptions, no

person shall be held to answer for crime unless upon indictment. Amendment of Const. of U. S., Art. 5. Pub. Sts. c. 206, § 3.[1] This means an indictment found in the usual course of proceedings. It is not however necessary that each grand juror shall be free from bias or prejudice, provided he has the general qualifications which are required. Such a test is not implied either from the terms of his oath or from the nature of his duties. If such an inquiry were open, the delays and complexity of criminal trials would be greatly increased, and no correspondingly useful purpose would be served." To the same effect are *Commonwealth* v. *Rain*, 5 Mass. 90; *Tucker's Case*, 8 Mass. 286; *Commonwealth* v. *Brown*, 147 Mass. 585; *Commonwealth* v. *Hayden*, 163 Mass. 453, 455.

The court will not inquire whether competent evidence was heard by the grand jury. *Commonwealth* v. *Hayden*, 163 Mass. 453, 455. *Commonwealth* v. *Walsh*, 255 Mass. 317, 319. *Commonwealth* v. *Ventura*, 294 Mass. 113, 120. Before the return of an indictment tried in *Commonwealth* v. *Knapp*, 9 Pick. 496, after the charge was delivered to the grand jury, the accused moved that the court instruct the grand jury as to the nature of the evidence proper to be received by them. The court denied the motion stating: "It is to be presumed that only proper evidence will be laid before the jury. There is a difficulty in determining beforehand what may or may not be proper; and it would be inconvenient, to say the least, to instruct them on hypothetical cases. The law reposes confidence in the officers of the government in relation to this subject. If any thing improper shall be given in evidence before the grand jury, the error may be corrected subsequently upon the trial before the petit jury" (pages 495-496).

Ground 1, accordingly, discloses no violation of art. 12

[1] See now G. L. c. 263, § 4 (as amended through St. 1953, c. 319,

of the Declaration of Rights. Upon any decisions of the Supreme Court of the United States which have come to our attention, there was no violation of the Fourteenth Amendment. The commencement of a State prosecution for crime by indictment by a grand jury is not required as "due process of law." See *Hurtado* v. *California*, 110 U.S. 516, 521-522, and the reference to Chief Justice Shaw and *Jones* v. *Robbins*, 8 Gray, 329. See also *Kennedy* v. *Walker*, 135 Conn. 262, 273-274; affd. 337 U.S. 901. There was no problem similar to that in *Cassell* v. *Texas*, 339 U.S. 282. There is nothing which merits discussion with respect to 18 U.S.C. (1952) § 241.

6. The sixth ground and the defendants' exception to setting the trial date may conveniently be considered together. Both are based upon allegations as to news releases and as to statements of enforcement officials, Federal and State. Ground 6 embodies a contention that the defendants never can be tried because they never can be given a trial which is both fair and speedy. The treatment of the special pleadings in the court below presents ground 6 on the basis that there would be no reason for abatement of the indictments even if enforcement officials should be found to have issued any statements and news releases contained in the Boston newspapers and several national magazine articles mostly dated between January 12 and the end of February, 1956. The hearing upon the special pleadings at which the newspapers and magazines were marked as exhibits took place on May 17 and 29 and June 1 and 4, 1956. The motions to quash, pleas in abatement, and pleas in bar were denied on June 4. Some of the indictments had been returned on January 13, 1956, and most of them on January 16, 1956. Also on June 4, the judge set the trial date as August 6, 1956. At that time the defendants objected on the ground that they could not get a fair, impartial, and speedy trial. Although invited to

do so by the judge, counsel for the defendants made no motion for a continuance. No motion for change of venue was filed, doubtless because of a contention that in no county of the Commonwealth could a fair trial be had.

The newspaper coverage was undoubtedly extensive, and was commensurate with a crime of colossal proportions. In the closing arguments to the jury by counsel for some of the defendants and by the district attorney it was described as "the biggest armed robbery in the history of the country" and "the biggest robbery in history." If there was publicity created by enforcement officials, this was indefensible. It does not follow, however, that the inevitable result is that the defendants must be released, because they can never constitutionally be tried (see *Delaney v. United States*, 199 F.2d 107, 112 (1st Cir.)), no matter how these particular indictments should be quashed. Nor must we conclude that these convictions should be set aside because of the trial date.

Let us consider the issue which faced the judge. From the record of the hearing before him, it is clear that there never could have been a date for trial to which the defendants would not have objected. In substance, their view was a contention that the period of alleged prejudice to the defendants would outlast the entire time, whatever that might be, during which a trial, properly called speedy, might be held. The judge knew that since January 17, 1950, there had been a public realization that a robbery of extraordinary notoriety had remained unsolved. The holdup, the commission and the record amount stolen could not help to arouse general interest and to stimulate the channels of public information, such as newspapers, magazines, radio, and television. This was no setting for apathy. The judge, whose opinion is entitled to great weight, was in a better position than are we to evaluate the effect of publicity at the time he set the date for trial. His was the

primary duty, which the record shows he understood and undertook to discharge with fairness to the defendants and to the citizens of the Commonwealth. Realizing that much publicity as to this bizarre crime was inevitable, and that by far the greater part of that of which the defendants complain occurred in the last half of January and in February, the judge in June could reasonably have concluded that its effect had abated or would abate by August to an extent sufficient to permit a fair trial, particularly with the care reasonably expected to be taken in selecting the petit jury. See *United States* v. *Keegan*, 141 F.2d 248, 258 (2d Cir.); *United States* v. *Leviton*, 193 F.2d 848, 857 (2d Cir.).

We cannot say that there was error in dealing with the sixth ground of the special pleadings or that on June 4, 1956, it was an abuse of discretion to select August 6, 1956, as the trial date. See *Commonwealth* v. *Millen*, 289 Mass. 441, 463-464; *Commonwealth* v. *Bonomi*, 335 Mass. 327, 333; 63 Harv. L. Rev. 840, 846-848.

7. On August 6, 1956, the defendants filed further motions to quash, pleas in abatement, and pleas in bar which related to newspaper publications in the interval since the first special pleadings. These were received as exhibits with reference to the new motions and pleas, all of which were respectively denied and overruled. These raise no new point and are governed by what has been hereinbefore said.

8. The defendants excepted to being put on trial on the conspiracy indictment along with the more serious, substantive offences. This was matter within the trial judge's discretion of which no abuse appears.

9. The defendants allege error in the examination and selection of jurors, a process which consumed over sixteen trial days from August 7 to 29, 1956. The statistics we take from the defendants' brief. The trial judge examined 1,400

veniremen in open court. He excused 426 who testified that they had disqualifying opinions and 239 because of ill health or other reasons. The Commonwealth peremptorily challenged 163 who had been declared indifferent. The defendants exhausted their 262 peremptory challenges on August 29.[1] Before exercising a peremptory challenge the defendants challenged for cause each prospective juror who had not been excused or challenged peremptorily by the Commonwealth. As to each case the defendants asked leave to conduct a voir dire examination, moved that there be put certain questions contained in their "motion for questions to jurors," and made offer of proof of the exhibits of newspaper articles which had been offered at the hearings on the special pleadings. They also offered to prove that if a prospective juror should be asked questions 7, 9, 10, 12, 15, 17, 18, and 19,[2] in the "motion for questions to jurors," he would answer in the affirmative.

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[1] General Laws, c. 234, § 29 (as amended through St. 1955, c. 485, § 8), read: "Upon the trial of an indictment for a crime punishable by death or imprisonment for life, each defendant shall be entitled to twelve peremptory challenges of the jurors called to try the case, and in other criminal cases each defendant shall be entitled to three such challenges; provided, that each defendant in a capital case in which additional jurors are chosen under section twenty-six B shall be entitled to one additional peremptory challenge for each additional juror. In every criminal case the commonwealth shall be entitled to as many such challenges as equal the whole number to which all the defendants in the case are entitled. . . ." See now G. L. c. 234, § 29 (as amended through St. 1957, c. 335), which was enacted upon the recommendation of the Judicial Council. 1956 Pub. Doc. No. 144, p. 42.

[2] "7. Have you read any articles in any newspapers or magazines concerning the Brink's case?"

"9. Have you read or heard that J. Edgar Hoover, Director of the F.B.I., or Herbert Brownell, Attorney General of the United States, or the Department of Justice has said that the Brink's case had been solved and that these defendants had committed that robbery?"

"10. Have you read or heard what J. Edgar Hoover or Herbert Brownell or the Department of Justice has said about how the Brink's case had been solved?"

"12. Have you read or heard what J. Edgar Hoover, Herbert

The defendants also excepted whenever the judge declared a venireman indifferent.

In order to understand in proper perspective the exceptions as to the examination and selection of jurors, a close reading of more than 1,500 pages in the typewritten transcript is required. There is thus revealed a patient and careful succession of examinations by the trial judge. Not until the defendants' challenges were exhausted was the first juror seated on the fourteenth day of the trial and the thirteenth day of examining veniremen. Of every one the judge asked the four questions prescribed by G. L. (Ter. Ed.) c. 234, § 28, which reads: "... the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein ..." Other questions were asked which, in one instance after another, the judge deemed appropriate. Occasionally, but not always, he put questions suggested by the defendants.

The denial of the "motion for questions to jurors" and the refusal to put other questions, to the extent that they were refused, were within the discretion of the judge. Such has been the long standing practice in this Commonwealth. *Commonwealth* v. *Gee*, 6 Cush. 174, 177-178. *Commonwealth* v. *Barronales*, 145 Mass. 242, 243-244. *Commonwealth* v.

Brownell or the Department of Justice has said about the criminal records and records of arrests of these defendants?"

"15. Have you read or heard how the Brink's case was solved?"

"17. Have you read or heard about the criminal records and records of arrests of these defendants?"

"18. Have you read or heard that Specs O'Keefe has pleaded guilty to participating in the Brink's robbery?"

"19. Have you read or heard that Specs O'Keefe has named these defendants as those who participated with him in committing the Brink's robbery?"

Crockett, 457 Mass. 180, 195-196. *Commonwealth* v. *Phelps*, 209 Mass. 396, 414-415. *Commonwealth* v. *Spencer*, 212 Mass. 438, 444-446. *Commonwealth* v. *Snyder*, 282 Mass. 61, 71. *Commonwealth* v. *Lee*, 324 Mass. 714, 717-718. *Commonwealth* v. *Taylor*, 327 Mass. 641, 646-647. *Commonwealth* v. *Bonomi*, 335 Mass. 327, 333-335.

The defendants quote from an opinion of Mr. Justice Holmes in *Commonwealth* v. *Poisson*, 157 Mass. 510, 512, which we fully approve, that this discretion "is exercised wisely by not going beyond the usual questions, unless something appears which makes it proper to go further." They contend that something further appears in the publicity. The determination of this matter was still in the discretion of the trial judge. As was said in *Commonwealth* v. *DiStasio*, 294 Mass. 273, 280, "In this Commonwealth the examination of prospective jurors is 'under the direction of the court,' whether conducted by counsel, as is customary, by the judge. Seldom is it permitted to extend beyond the statutory questions. *Commonwealth* v. *Cole*, 264 Mass. 264, 270, 271. Whether other questions shall be asked is discretionary with the judge. *Commonwealth* v. *Millett*, 289 Mass. 441, 475, 476."

We find no abuse of that discretion. It is not enough to describe the conduct of the voir dire as "pedestrian" or "unimaginative." Without surrendering the direction of the examination to the defendants' counsel, who repeatedly asserted that no unbiased jury could be empaneled, the trial judge spent many hours asking questions which must have numbered up into the thousands. This he continued to do even while it was apparent that the defendants would exhaust their 262 challenges before a juror would be accepted.

The defendants argue that they were compelled to use forty-five of their peremptory challenges upon forty-five veniremen who were erroneously ruled to be indifferent.

Without extending the discussion, we hold that no harmful error is revealed.

The defendants complain as to two jurymen who, they argue, were erroneously declared indifferent and were seated. Because their examinations are typical of the fairness and the carefulness of the judge's conduct of the voir dire, and mere recapitulation refutes the contention of error, we set them forth at length.

Wolusky was the first juror chosen. The material part of the voir dire was as follows: "Q. [THE JUDGE] Have you formed or expressed any opinion as to the guilt or innocence of any of these defendants? A. I don't have a firm opinion. Q. Are you related to any of them? A. No, sir. Q. Have you any connection whatever with Brinks, Inc.? A. No, I haven't. Q. Have you any personal interest or personal connection with this case? A. No. Q. Are you aware of any bias or prejudice for or against anyone in this case? A. Not that I know of. . . . Q. Have you served on a jury before? A. Yes, sir. THE JUDGE: Then you know what to expect, what is expected of you. . . . The juror is indifferent. . . . COUNSEL FOR THE DEFENDANTS: The same objection and exception and challenge for cause for all defendants. Specifically we object and except to Your Honor's ruling that the venireman stands indifferent, because of the statement that he, and I quote, said, 'I don't have a firm opinion,' which indicates he has some opinion. . . . THE JUDGE: Very well. When I asked you that question I understood that you would be able to take the oath of a juror, to well and truly try the issues between the Commonwealth and the defendants, according to the evidence. That would be uninfluenced in any way by any preconceived notions. . . . THE JUROR: You are right, because I don't convict anyone unless I know the facts, and I don't know the facts." The judge, at the request of the defendants, asked, "Are you acquainted with any of the

lawyers for the defendants or attorneys for the Commonwealth; and if so, is that acquaintance such as to embarrass you in any way in hearing this case?" To which the juror answered, "I don't know any of them."

The other juryman was Leary, the fourteenth and last juror chosen. The material part of the voir dire was as follows: "Q. Do you know of any reason why you cannot serve on this jury? A. No, Your Honor. Q. Have you expressed or formed any opinion as to the guilt or innocence of any of these defendants? A. I have a tentative opinion; could be changed. Q. You have a tentative opinion. Have you served on the jury before? A. No, Your Honor. Q. If you are accepted as a juror, an oath will be administered to you that your will well and truly try the issues between the Commonwealth and these defendants, according to the evidence, which means that you should serve with an open mind and decide the case purely on the evidence as it will be presented here, uninfluenced by any preconceived notion, ideas, or opinions that you may now have. Do you think you could take that oath and adhere to it faithfully? A. I do, Your Honor. Q. Very well. You are not related to any of these defendants? A. No, Your Honor. Q. And you never had any connection with Brink's in any way? A. No, sir. Q. You have no personal interest in this case? A. None whatever, Your Honor. Q. Are you aware of any prejudice or bias for or against anyone in this case? A. No, Your Honor. Q. Do you know of any reason that would prevent you from reaching a fair and impartial decision or verdict exclusively on the evidence and under the law as the court will give you the law? A. No. . . . COUNSEL FOR ONE OF THE DEFENDANTS: If Your Honor please, before the juror is sworn, since the interrogation has indicated that the juror testified that he had a tentative opinion, but it could be changed, would Your Honor address questions to the juror as to whether or not

he knows how much evidence would be necessary to change his opinion? Q. [By the judge] Mr. Leary, if you are sworn as a juror, you will be instructed by the court that every defendant is presumed to be innocent, and that it will be your duty to bring in a verdict, return a verdict of not guilty, unless you are convinced beyond a reasonable doubt on the evidence and the law that he is guilty. Now, do you think that your opinion, or whatever notions you have, will interfere with carrying out that oath, those instructions? A. No, Your Honor."

There is one other complaint as to the selection of the jury which we shall discuss. This has to do with Jacoby, who was accepted and sworn as the ninth juror. He had stated that he had neither expressed nor had any opinion as to the guilt or innocence of any of the defendants and that he had no bias or prejudice for or against anyone in the case. After being segregated with the other eight jurors for two days, he desired to address the court. He then testified, "I didn't realize it was the Brink's case when I was called, and I have become emotionally upset about this whole business, and I don't seem to fit into the group at all that have already been selected, and I wish to be excused." The voir dire continued: "Q. [By the judge] What do you mean when you say you didn't know this was going to be the Brink's case? Did you have an opinion about the Brink's case? A. I have read in the papers a little bit about it. Q. So that you have formed an opinion about the Brink's case? A. Yes, I have, sir. [THE JUDGE: Well, then, the court will excuse you as a juror." The action of the judge was proper. *Commonwealth* v. *Galvin*, 323 Mass. 205, 213-214. At the time no objection was made.

After two more prospective jurors were examined, one of whom was accepted, the defendants moved for a mistrial on the grounds that Jacoby, who had had an opportunity to discuss this matter with other jurors who had been

sworn, had been "excused because of an opinion which apparently he had prior to his being accepted as a juryman." The defendants also moved that the judge interrogate the eight jurymen as to whether there had been any discussions with Jacoby concerning the case. Both motions were denied. Their denial was within the judge's discretion. In *Commonwealth* v. *Phelps*, 209 Mass. 396, 415, it was held, even in a capital case, that a defendant did not have a right to have the jurors who had been sworn and empanelled kept together before the empanelling was completed. In *Commonwealth* v. *Bellino*, 320 Mass. 635, 641, it was said, "We see nothing of consequence in the fact that during the trial fourteen men instead of twelve may have discussed among themselves various aspects of the case, and that remarks of those who subsequently were discharged may have made some impression upon the twelve that remained."

10. The defendants attack a number of miscellaneous rulings in the admission of evidence. None of the evidence complained of was expressly admitted for the purpose of corroboration. The defendants' position is that the witnesses who gave it could have been called for no other purpose than to convince the jury of the truth of O'Keefe's testimony. They object that the evidence did not tend to connect them with the crimes charged, and that the effect of the evidence was to corroborate the testimony of an accomplice on a collateral point not material to their guilt. Reliance is placed chiefly upon *Commonwealth* v. *Holmes*, 127 Mass. 424. Evidence not admitted as corroborative does not fall within the rule of that case. *Commonwealth* v. *Wilson*, 152 Mass. 12, 15. Without unduly prolonging the discussion, it is our opinion that the evidence under attack tended to show the method of carrying out the objects of the armed robbery and the conspiracy to commit it. "Evidence of the attendant circumstances may aid the

had been offered, and published in the Boston newspapers, for the apprehension and conviction of those who had committed the robbery. The defendants were not permitted to do this, and now contend, although they did not so state at the time of the offer, that this evidence was admissible to show that O'Keefe in testifying was actuated by hope of this reward. It may be observed that as a participant in the crime, O'Keefe could not have become a participant in the reward. *Jenkins* v. *Kelren*, 12 Gray, 330, 332. 46 Am. Jur., Rewards, § 16. 77 C. J. S., Rewards, § 37. Furthermore, in the absence of any statement as to the purpose of the offer, the judge was justified in rejecting it.

15. The defendants, at a time when no witness was on the stand, offered photostatic copies of certain pages of Boston newspapers for various dates in January, 1950. The Commonwealth agreed that these might be used in place of the originals, but made objection on the ground of materiality, and the objection was sustained. The purpose of the offer was to show that O'Keefe could have gained his familiarity with the Brink's premises from plans, diagrams, and descriptions contained in those newspapers. There was no testimony that the plan, diagrams, and descriptions were authentic, or that if O'Keefe ever read them they corresponded with his testimony. There was no error in the exclusion of these newspapers.

16. A chauffeur, called as a witness by the defendants on October 3, 1956, testified that on that date at their request he had driven from the Brink's premises at 165 Prince Street to 14 Bickford Avenue, Roxbury, where Maffie's parents lived, and thence to Egleston Square, near McGinnis's store. This route was that which O'Keefe testified had been taken by the participants in the robbery. The purpose of the evidence was to show that the defendant Pino could not have been in Egleston Square on the evening of January 17, 1950, at the time witnesses had placed

him there and still have been a participant in the robbery. The evidence could have been excluded on the ground that the traffic, weather, and light conditions were not shown to be sufficiently similar. No offer of proof was made as to the time the witness took to drive from Prince Street to Bickford Avenue, but an offer of proof was made that it took three minutes to go from Bickford Avenue to Eglestón Square. As there was nothing to show the total time for the entire trip taken by the witness, no harm to the defendants is apparent.

17. The defendants Faherty and Richardson raise questions of evidence not applicable to the other defendants.

(a) The other defendants were arrested on January 12, 1956. There was evidence that these two defendants were absent from their homes and customary vocations from January 12, 1956, to May 16, 1956, when they were arrested in an apartment at 87 Coleman Street, Dorchester, by F.B.I. agents, who had Federal warrants for both. They contend that since Federal and State offences are separate and distinct crimes against different sovereigns, even though arising out of the same facts, evidence of flight, hiding, or disguise was not admissible to show consciousness of guilt in favor of either sovereign. The general principle is not contested that evidence of flight of one accused of a crime is admissible as some evidence of consciousness of guilt. *Commonwealth* v. *Brigham*, 147 Mass. 414, 415. *Commonwealth* v. *Goldberg*, 212 Mass. 88, 91. *Commonwealth* v. *Cline*, 213 Mass. 225, 227. *Commonwealth* v. *Corcoran*, 332 Mass. 615, 619. Wigmore on Evidence (3d ed.) § 276. 25 A.L.R. 886. It has been held elsewhere that mere evidence of flight where an accused is charged with more than one offence may be a matter of conjecture. *People* v. *McKeon*, 64 Hun, 504, 506. But where the evidence has probative force with respect to the crime charged, it does not become inadmissible merely because it also

tended to show the commission of another crime. *Commonwealth* v. *Madeiros*, 255 Mass. 304, 314. *State* v. *Bonnica*, 60 Mont. 362, 365-366. The robbery with which the defendants were charged violated both State and Federal law. It would be naive to reject the evidence here considered as lacking pertinency as to the crimes of which the defendants have been tried and convicted. We refer to the testimony of the special agents of the Federal Bureau of Investigation that the color of Richardson's hair had become reddish brown instead of grey as usual; the presence in the apartment of loaded weapons, ammunition, a hair cutter, and a bottle of preparation to recolor hair; and the efforts to locate Faherty by television and otherwise. *State* v. *Lucey*, 24 Mont. 295, 303. *People* v. *Ogle*, 104 N.Y. 511, 513-514. *State* v. *Falcone*, 41 R.I. 399, 400-401.

(b) Richardson assigns error that there were not admitted in evidence two records of the United States Commissioner, District of Massachusetts, of proceedings on complaints dated January 19, 1956, by John P. Larkin, special agent of the F.B.I., one against Faherty and one against Richardson. The charge in each case was violation of 18 U.S.C. (1952) § 1073, in that the defendant "did move and travel in interstate commerce with intent to avoid prosecution for the crime of armed robbery, as defined by the laws of the Commonwealth of Massachusetts, for the commission of which crime a warrant for his arrest had been issued by the Superior Court" for Suffolk County. The records each show that the proceedings taken were on May 16, 1956, that the defendant was presented, and discharged on the recommendation of the government. The record of the trial in the cases at bar shows that these records were offered for identification, and that they were so marked, subject to the exception of Faherty and Richardson. We shall assume that the exception is to failure to admit in evidence. The argument is made that these record-

were admissible on the issue of flight and that the defendants were not hiding from the Commonwealth. It does not appear that this ground of admissibility was brought to the attention of the judge. In any event, the defendant who assigns error was not harmed, because the records would have been certified proof to the contrary of his contention and would tend to show that he had fled to escape the charge of armed robbery made in the Superior Court.

Faherty and Richardson severally assign errors as to statements which F.B.I. agents and police officers testified that each made. We shall not pause to analyze those questions as to which no exception was taken or which are not now argued. Nor shall we unduly extend this opinion by a discussion of evidence admitted without objection and later sought to be struck out because the question was allegedly improper but not because of alleged impropriety of the answer. "The rule generally prevailing in this Commonwealth is that objections to matters of evidence must be seasonably made and exceptions taken when the evidence is offered . . .; and a party cannot of right insist upon saving an exception to evidence by thereafter seeking to have the evidence struck out. . . ." *Commonwealth* v. *Theberge*, 330 Mass. 520, 527. See *Boyle* v. *Columbian Fire Proofing Co.*, 182 Mass. 93, 99; *Commonwealth* v. *Boyle*, 323 Mass. 633, 634-635.

Special agent McNamara of the F.B.I. testified that he interviewed the defendant Richardson at the office of the F.B.I. in Boston. Richardson, asked if he had participated in the Brink's robbery, said that he had not; that he did not know where he had been on that day; and that if he was not working, he was probably drunk. Informed that he did not work, he repeated that he was probably drunk. Asked at what time he left the house in the morning, he said that he probably left at 7:45; and that he could not recall what bars he went to. He said that he knew Geagan;

had been acquainted with Faherty for a number of years; was a close friend of Pino and had worked for him; and that he had known Costa for a great many years, and had worked for him also. The conversation was admissible and the question asking for it was proper. If any portion of the answer was objectionable for any reason, a motion to strike was the proper procedure. *Jacobs* v. *Cromwell*, 216 Mass. 182, 184. *Commonwealth* v. *Anderson*, 220 Mass. 142, 145. *Commonwealth* v. *Rudnick*, 318 Mass. 45, 62. At one point in McNamara's testimony the judge stated that in order to save the necessity of objections by counsel for the other defendants, anything that Richardson was alleged to have said was admissible against him. This was not a ruling that the judge was admitting as evidence anything that anybody might testify that Richardson said, no matter where, when, or in what circumstances.

A similar unreasonable construction is attempted to be placed upon the testimony of one Shanahan, a police stenographer, who transcribed notes of interrogations of Richardson and of Faherty by Captain Wilson of the Boston police. A copy of the stenographic statements had been given to counsel for these defendants, who had marked questions to which he objected. During a long colloquy the latter said, "As to the statement on Faherty, it is obviously imperfect because parts of it are not admissible. He was silent after being confronted with questions." The judge replied, "Anything the man says at any time is admissible," and the assistant district attorney added, "These excerpts of it are." The assistant district attorney said that he would not read the "silent ones." The only other objection was to one question which was contended to be unintelligible. There was no error in these respects. Having stated specifically the basis of their objections, they cannot urge other grounds in this court. *Kagan* v. *Levenson*,

234 Mass. 100, 107, and cases cited. Wigmore on Evidence (3d ed.) § 18.

18. At the close of the evidence the defendants' counsel directed the judge's attention to certain statements in the district attorney's opening which were said not to be borne out by evidence. At the conclusion of the charge there was no exception taken on this matter. Assuming the question to be open, we note the contention that it was error not to instruct the jury to disregard those statements. We do not agree. Near the beginning of the charge the judge said, "Of course, as I said before, what counsel—and I mean now the district attorney as well as counsel for the defendants—say to you in their openings and through the course of the trial, or in their summations, is not evidence. You are to judge the case, weigh the case absolutely on what evidence has been presented here during the trial." Similarly, statements had been made by counsel during the course of the trial. For example, the district attorney near the beginning of his opening had made a clear statement that the opening was not evidence but merely a preview of what the Commonwealth expected to prove. After the Commonwealth had closed its direct case, counsel for the defendants stated to the jury, "the district attorney of Suffolk County, who opened for the Commonwealth—and I might say opened in a very proper and intellectual manner—instructed you people generally in his opening as to what an opening meant."

19. At the conclusion of the district attorney's closing argument, it having been agreed that objections would have the same effect as though taken during the argument, counsel for the defendants orally requested the judge to instruct the jury to disregard certain portions thereof. The judge denied most of these requests, and saved exceptions to the denial. In these circumstances, failure to renew the exceptions at the close of the charge was not fatal.

London v. *Bay State St. Ry.*, 231 Mass. 480. *Doherty* v. *Levine*, 278 Mass. 418, 419-420. *Heine* v. *Broadway Fruit Mkt., Inc.*, 304 Mass. 608, 610-611. *Commonwealth* v. *Domanski*, 332 Mass. 66, 70-71. Cf. *Commonwealth* v. *Cabot*, 241 Mass. 131, 151.

(a) The first group of exceptions concerns references to the Federal Bureau of Investigation; to Agent Powers, the head of its Massachusetts district; and to Agent Larkin. These two agents did not testify, but many of the bureau's employees did. The bureau had been mentioned many times in the course of the trial. O'Keefe had testified that he had first told his story to Agents Powers, Larkin, and Kehoe. In the arguments of two of the defence counsel, the F.B.I. had been portrayed or named in terms which, even on a mild construction, were quite derogatory. In the wake of such arguments, the district attorney could, without impropriety, refer to Powers and Larkin, who had been associated with the prosecution, and to the Federal Bureau of Investigation, and to its aims and ideals. It is inaccurate to charge that the district attorney injected the F.B.I. into his argument.

(b) The defendants assign error in the refusal of the judge to instruct the jury that there was no evidence certain bags were "peculiar to longshoremen." There was no error. To begin with, the district attorney did not use this expression. What he said was: "[W]ho could get those bags? Where would you get bags like those with the names of a foreign country on them? Who could get them? Geagan? Yes. Geagan and Richardson." There was evidence that two bags marked as exhibits were found on the dump at Stoughton with the pieces of the destroyed truck. O'Keefe testified that "Richardson and Baker were told that they would have to carry in the bags that we were to use to carry out the stuff. . . . Tony [Pino] spoke to Geagan and Richardson and said that in view of the

fact that they had access to the type of bag we wanted, they should procure them. . . . They both said they would do that." O'Keefe identified one of the bags as being "one of the bags that we took there . . . [or] a brother to it."

(c) Error is assigned that the judge refused "to instruct the jury specifically with reference to the $60,000 referred to by the district attorney in his closing argument as 'trouble money' that it was introduced solely with respect to the issue of robbery but was not connected with any of the defendants." What the district attorney said was, "You remember the testimony of Spec O'Keefe when he said, 'We took $10,000 and we put it aside. It was trouble money that could have been detected. It could have been readily detected because it was new money.' That was the money that McGinnis was to destroy. You will have approximately $60,000 of that money, Mr. Foreman and Gentlemen of the Jury, and there are the ten $1,000 bills."

There was no error. O'Keefe testified that they counted the money at the Maffie house immediately after the robbery; that one package contained ten $1,000 bills in new money; that there was $96,000 or $98,000 of new money (whether in addition to the $10,000 is not clear); that they did not "figure" that they would be able to use it, and that the $10,000 (at any rate) was put upon the mantel piece, later to be destroyed; that McGinnis said that it was a shame that they could not use that money, and suggested running it through a washing machine with coffee for color to make it look old; and that everybody there said that that was not practical, and that they wanted it burned.

(d) There was no error in refusing to instruct the jury that there was no evidence that the defendants Faherty and Richardson were potential murderers. There was testimony that when they were captured they had loaded guns.

The district attorney had argued: "Now, Faherty and Richardson. Let's see where they were. Mr. Foreman and Gentlemen of the Jury. And when you go in there, I want you to take this little instrument with you. They are not gunmen! They are not potential murderers!" They are not robbers! Well, Mr. Foreman, take that little weapon and swing it around so that you can look in there. These guns were loaded."

(e) There was no error with respect to the district attorney's reading from *Commonwealth* v. *Webster*, 5 Cush. 295, 319. "This [an alibi] is a defence often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it, is to be subjected to a rigid scrutiny." The judge refused to instruct the jury specifically that this quotation should not be considered by them as the law. He did, however, give a general instruction, in substance, that it was the duty of the court to instruct on the law.

20. The defendants assign error that the judge failed to charge that there was no evidence corroborating O'Keefe. They concede that there is no rule of law in this Commonwealth that such instructions be given. There was no error in this respect. See *Commonwealth* v. *Wilson*, 152 Mass. 12, 15; *Commonwealth* v. *Bishop*, 165 Mass. 148, 150; *Commonwealth* v. *Phelps*, 192 Mass. 591, 595; *Commonwealth* v. *Leger*, 264 Mass. 217, 220; *Commonwealth* v. *Lammi*, 314 Mass. 159, 164-165. We do not intimate that such corroborative evidence was lacking.

21. The defendant McGinnis, who was charged in certain indictments with being an accessory before the fact, assigns error in that the judge refused to instruct the jury that he could be found guilty only if he committed accessory acts on or after December 16, 1949, or if St. 1955, c. 781, was unconstitutional as ex post facto, on or after January 16, 1950. His contention, for which he states he

has found no authority, is that the "offence is completed on the date on which the accessory last incites, procures, aids, counsels, hires, and commands the principal to commit the substantive offence, and not on the date when the substantive offence was committed." We do not accept this contention. "One becomes an accessory before the fact by the commission of a felony by another whom he has urged to commit it." *Commonwealth* v. *Bloomberg*, 302 Mass. 349, 356. McGinnis became an accessory by the commission of the several crimes by the respective principals on January 17, 1950. This was within the six year statute of limitations contained in G. L. (Ter. Ed.) c. 277, § 63, before it was amended to ten years by St. 1955, c. 781, which took effect on December 15, 1955. *Imholte* v. *United States*, 226 F.2d 585, 589 (8th Cir.).

Judgments affirmed.

Rescript

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON,

July 1, 1959.

IN THE CASE OF

COMMONWEALTH

v.

MICHAEL VINCENT GEAGAN & others
(and twelve companion cases)
pending in the Superior Court for the County of Suffolk

ORDERED, that the clerk of said court in said county make the following entry under each of said cases in the docket of said court; viz.,—

Judgment affirmed.

BY THE COURT,

FREDERICK L. QUINLAN, *Clerk.*

July 1, 1959.

Brief statement of the grounds and reasons of the decision:

Reasons as on file.

A true copy,

Attest:

(s) FREDERICK L. QUINLAN, *Clerk.*

ILE COPY

Office-Supreme Court, U.S.
FILED
OCT 21 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 421.

MICHAEL VINCENT GEAGAN, ET ALL., *Petitioners*,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

EDWARD J. McCORMACK, JR.,
Attorney General of the
Commonwealth of Massachusetts,
GARRETT H. BYRNE,
District Attorney, Suffolk District,
JOHN F. McAULIFFE,
Special Assistant Attorney General,
Assistant District Attorney,
GEORGE E. HURLEY,
Special Assistant Attorney General,
Attorneys for Respondent.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 421.

MICHAEL VINCENT GEAGAN ET ALL., *Petitioners*,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Statement of Facts.

On January 17, 1950, seven of the defendants who are appellants in this appeal, armed with loaded guns and identically disguised, aided and abetted by the defendant McGinnis, held up and robbed the employees of Brink's Inc., located at 165 Prince Street, Boston, of $1,219,000 in cash. Brink's, Inc., was in the business of the transportation of money and valuables (Tr. 2133, 2143, 2170-2181).

This holdup was the result of skilful planning commencing in the fall of 1947, when Pino suggested it to O'Keefe (Tr. 3172). At that time the Brink's money-office was located on Federal Street, Boston. Various observations and other activities were suspended when the offices were moved to the location that Brink's occupied at the time of

the holdup. Previous to staging the holdup, all the defendants, including Banfield, Gusciora and O'Keefe, entered the Brink's offices on many occasions. They made a careful study of same with a view to the holdup (Tr. 3217).

At approximately 7 p.m. the five Brink's employees who were on duty that evening were in the vault room, checking and sorting the day's receipts, when they heard a command: "Stick em up and open the door." The command was given by one of the holdup men, all of whom were dressed similar to Brink's employees, in dark trousers, pea jackets, chauffeur's caps and also wearing masks and gloves. One of the employees (Grell) opened the door as ordered; the gunmen barged in, giving Lloyd, the employee in charge, a shove and ordering all the employees to get on the floor with their faces down and their hands in back of them. While one of the gunmen was tying up Lloyd, he told him to "Take it easy and you won't get hurt, you know the stuff we want." The gunmen then bound and gagged the five employees, using rope to tie their legs and their wrists behind their backs, and placed adhesive tape over their mouths. They also took their guns and took the eyeglasses of one of the employees.

The parts played by those engaged in the holdup are as follows: One Banfield, who died before trial, drove the truck used in the holdup from Roxbury to Snow Hill Street, North End of Boston, in the immediate vicinity of the Brink's offices. The defendant Pino stayed in the truck with Banfield and stopped the truck at the entrance to Brink's in order to cart the loot away.

Costa was on the roof of a house on Prince Street, from which location he could see into the Brink's offices, and from which he gave the signal to his confederates that everything was all set to stage the holdup. The defendants Geagan, Faherty, Richardson, Maffie and Baker, along with one Gusciora, who died before the trial, and

with one O'Keefe, who pleaded guilty and testified as a government witness, left the truck and proceeded through the playground. Half-way through the playground they received the prearranged signal from Costa, and proceeded into the Brink's premises by means of a key provided by the defendant Pino. They proceeded through four other locked doors, using keys provided by Pino, and emerged at the vault room, where the robbery occurred as heretofore described (Tr. 3413-3420). The defendant McGinnis, who had taken part in the extensive planning of this holdup, the disposal of the loot to be obtained and the equipment to be used, remained at his place of business, providing himself with an alibi (Tr. 3533).

The defendants removed the money from the Brink's premises in bags provided by the defendants Richardson and Geagan, and then loaded it onto the truck parked outside 165 Prince Street, in which truck Banfield, the driver, and Pino, in back, were waiting for them. When the loot was placed in the truck, all who took part in the holdup got into the truck, which was covered by a canvas, and drove away, taking a right turn on a narrow street named Lafayette Avenue (Tr. 2821). In the meantime Costa had left his lookout on Prince Street and got into a stolen car parked on Prince Street some distance in the rear of the holdup truck. He then followed close behind the holdup truck as a decoy, prepared to use any means to prevent any interference with the get away, including police interference (Tr. 2819, 2820).

Argument.

The respondent, before attempting any detailed discussion of the various points raised in this petition for writ of certiorari, suggests that an examination of the "tran-

script of the evidence" taken during the entire proceedings before and during the trial reveals that there are many factual statements and various conclusions of law and fact set out in the present petition and its accompanying brief which are, to say the least, utterly mistaken, unsound and erroneous. They are not warranted by anything that appeared in the proceedings preliminary to and during trial and are not warranted by anything in the "transcript of the evidence," consisting of 5328 pages.

The real essentials of due process under the Constitution of the United States are notice of the charge and adequate opportunity to be heard in defense of it. The constitutional rights of the petitioners were observed in every detail, both during the course of the preliminary hearings, the trial of the case, and the appeal before the Supreme Judicial Court of Massachusetts.

The petitioners presented four questions to this Honorable Court wherein they claimed a denial of due process. The respondent will answer them in the order set out in the petition.

I.

As the substance and not the name of the pleading controls, the respondent will answer the questions under the forms of procedure to which their substance is appropriate.

Commonwealth v. *Wakelin*, 230 Mass. 567; 571.
Toy v. *Green*, 319 Mass. 354, 357.

A motion to quash is confined to taking an objection to an indictment "for a formal defect apparent on the face thereof."

Mass. G.L. (Ter. Ed.) c. 278, sec. 17.

The defendants' motions to quash were rightly overruled, as the offense in each indictment is described and pleaded with technical precision, and the indictment was sufficient in form.

Commonwealth v. *Packard*, 185 Mass. 64, 65.
Commonwealth v. *Jordan*, 207 Mass. 259, 265-268.
Commonwealth v. *Wakelin*, 230 Mass. 567, 570, 571.

A motion to quash an indictment merely tests the indictment on its face.

United States v. *Slobodkin*, 48 F. Supp. 913, 915.

The petitioners fail to cite any case and respondent is unable to discover any case which holds that the publicity complained of is a violation of the secrecy of the Grand Jury room.

The petitioners make no claim that the Grand Jury that returned these indictments was not legally constituted or that anything improper took place in the Grand Jury room. Therefore *Cassell* v. *Texas*, 339 U.S. 282, cited by the petitioners, is not pertinent.

There is a presumption of regularity in the proceedings of the Grand Jury.

People v. *Beerman*, 12 N.Y.S. 2d 888, 890.
Commonwealth v. *Galvin*, 310 Mass. 733, 735.

The Grand Jury is an informing and accusing body rather than a judicial tribunal.

Commonwealth v. *Woodward*, 157 Mass. 516, 517.
Commonwealth v. *Ventura*, 294 Mass. 113, 120.

"An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."

Lawn v. *United States*, 355 U.S. 339, 349.
Costello v. *United States*, 350 U.S. 359, 363.

The authorities cited by the petitioners deal with bias and or prejudice in the selection of Grand Jurors and no claim is made by the petitioners that the Grand Jury was not legally constituted and properly drawn or that any member of the Grand Jury, which returned the indictments, was biased or prejudiced. The petitioners claimed during the hearings on the preliminary motions that the indictments should be quashed and barred and that they should be discharged and forever free from prosecution.

The petitioners asked the trial court to rule that the Commonwealth of Massachusetts should be forever barred from constitutionally trying these defendants. The denial of this request was proper.

Delaney v. *United States*, 199 F. 2d 107, 112 (1st Cir.).

There was not a scintilla of factual evidence presented during the hearings held on the petitioners' preliminary motions or during the trial of the case to support the petitioners' argument that the District Attorney of Suffolk County ever conferred with Federal officials or State officials or any law enforcement agencies concerning the preparation of a press release set out on page 6 in the petition filed by the petitioners in this case, or acted either collectively or individually with any Federal or State officials in the stimulating of any publicity.

Moreover, the transcript shows that the trial justice called upon the defendants to produce facts to support their allegation and gave them every opportunity to do so. See Tr. 111, wherein the following appears: "THE COURT: 'Let me tell you now before anything else, I don't think that the court will allow any fishing expedition. These defendants have set up their pleadings and the burden is upon them to produce facts, produce an affidavit.'". The defendants failed to produce any facts to support their allegation.

The petitioners have failed to sustain the burden of proving their allegations, therefore every inference must be drawn against them.

Olmstead v. *United States,* 19 F. 2d 842, 845.

The record of this case further shows (Tr. 298-299) that, when defense counsel was asked by the trial judge whether he claimed that the District Attorney himself had done anything in regard to initiating the intrusion of the press into the process of the trial, defense counsel replied: "Oh no, your Honor."

And, further, defense counsel's complaint was not that the District Attorney had committed any improper acts, but that he had failed to act.

The prosecution is not to be prejudiced by the words or acts of persons having no relation to the case other than in the performance of their duties.

Commonwealth v. *Min Sing.* 202 Mass. 121, 127.

The instruments filed by the defendants, called "affidavits" in support of their pleadings, fall far short of meeting the requirements of Superior Court Rule 46 (Rules of

the Superior Court of Massachusetts, 1954, p. 44), the pertinent part of which reads as follows:

> "The court need not hear any motion, or opposition thereto, grounded on facts, unless the facts are verified by affidavit, or are apparent upon the record and files, or are agreed and stated in writing signed by the attorneys for the parties interested."

Nor do the instruments satisfy the statute, G.L. (Ter. Ed.) c. 277, sec. 74, which reads as follows:

> "The court may refuse to receive a plea in abatement or other dilatory plea to an indictment until its truth has been proved by affidavit or other evidence." (See Tr. 118, failure to satisfy statute.)

The statement by the petitioners on page 84 of their petition regarding the opinion of the Supreme Judicial Court of Massachusetts intimating that the court found that this publicity was created by prosecuting officials is a distortion. The record clearly shows that the trial court and the Supreme Judicial Court of Massachusetts found that the prosecuting officials neither created, initiated nor stimulated any of the publicity that appeared.

The petitioners' claim that the Commonwealth conceded the truth of their allegations is refuted by the record. The record shows that the Commonwealth refused to admit the allegations, or to file a replication or demurrer, and the Commonwealth's position was upheld by the trial court and by the Supreme Judicial Court of Massachusetts (Opinion in Petition, p. 111).

The only matter conceded by the Commonwealth and found by the court was that such matter did appear in the newspapers (Tr. 128, 149-150). Also the District Attorney denied any participation in such publicity (Tr. 286-288).

The position taken by these petitioners during the preliminary hearings on their motions and pleadings and during trial and in their appeal to the Supreme Judicial Court of Massachusetts was that the indictments were returned in violation of Article 12 of the Declaration of Rights of the Constitution of the Commonwealth, G.L. (Ter. Ed.) c. 277, sec. 5, the Fourteenth Amendment to the Constitution of the United States, and 18 U.S.C. (1952) sec. 241.

It should be noted that the Supreme Judicial Court of Massachusetts found there was no violation of the secrecy of the Grand Jury room (G.L. (Ter. Ed.) c. 277, sec. 5), and no violation of Article 12 of the Declaration of Rights of the Constitution of the Commonwealth or the Fourteenth Amendment to the Constitution of the United States. The court also found as follows: "There is nothing which merits discussion with respect to 18 U.S.C. (1952) sec. 241" (see Opinion, Petitioners' Brief, pp. 113, 116).

Article 12, Declaration of Rights, Massachusetts Constitution: "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

"And the legislature shall not make any law, that shall subject any person to a capital or infamous pun-

ishment, excepting for the government of the army and navy, without trial by jury."

Amendment 14, United States Constitution (adopted July 28, 1868), sec. 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

General Laws of Massachusetts (Ter. Ed.) c. 277, sec. 5 (pertinent part):

"You, as grand jurors of this inquest for the body of this county of , do solemnly swear that you will diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge; the commonwealth's counsel, your fellows' and your own, you shall keep secret; you shall present no man for envy, hatred or malice, neither shall you leave any man unpresented for love, fear, favor, affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God.

"The other jurors shall then be called in such divisions as the court considers proper, and the following oath shall be administered to them:

"The same oath which your fellows have taken on their part, you and each of you on your behalf shall well and truly observe and keep; so help you God."

18 U.S.C. 241 (June 25, 1948, c. 645, 62 Stat. 696):

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

"They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

II.

The respondent feels obligated to impress upon this Honorable Court that the claim of the petitioners alleging the District Attorney and his assistants and other State and Federal officials, acting together, issued, caused and stimulated massive prejudicial pre-trial publicity, as set forth in the petition (p. 94), is wholly unwarranted by anything that appears in the record.

Moreover, it should be noted that on January 27, 1936, when the District Attorney accused defense counsel of trying the case in the press, none of the defense counsel saw fit to deny it (Tr. 19, 20).

The Commonwealth has set forth the falsity of the petitioners' claim and refers this Court to the respondent's argument under Section I of this brief.

The petitioners, in support of their claim that the District Attorney instigated prejudicial publicity, offered the following television interview, which took place on Friday, January 13, 1956, the participants being a reporter from the television station and the District Attorney of Suffolk County. The complete interview appears in the testimony (Tr. 146-149). Especially significant is the following portion of the transcript, at page 148, line 5:

> "Q. You know, there are many people who are curious, Mr. Byrne, on how it was that Mr. O'Keefe suddenly decided to talk—I think a matter of days before the Statute of Limitations ran out.
>
> "Mr. Byrne: Well, of course, there's a matter of ethics involved here in the trial of any great criminal case, and I don't think I should draw any conclusions along that line because that's a matter that might come up during the trial of the matter.
>
> "Q. You wouldn't care to discuss this story here that says Specs O'Keefe talked because they held out on the loot?
>
> "Mr. Byrne: No, I don't think I should."

The position that the petitioners take with reference to their right to a fair and speedy trial is difficult to understand. They claim they have been denied a right to a speedy and impartial trial. They further claimed that they never should be tried and they refused to suggest a trial date even though invited to do so by the trial judge. The final position taken by the petitioners on August 6, 1956, was that they had a right to be discharged and forever free from prosecution for these offenses (Tr. 266). To uphold this claim of the petitioners that they could never be constitutionally tried would be a mockery of the

time-honored judicial system of Massachusetts and the history upon which it is founded.

Delaney v. *United States*, 199 F. 2d 107, 112.
Commonwealth v. *Millen*, 289 Mass. 441, 463, 464.
Crocker v. *Justices of the Superior Court*, 208 Mass. 162, 180.

The claim now made by the petitioners that it was unfair to try them *at that time* (August 6, 1956) is, to say the least, wholly at variance with the facts as they appear in the transcript.

The defendants failed to ask for a change of venue, refused to ask for a continuance even though invited to do so by the trial judge, and took the position that they never should be tried, but that they should be freed and forever discharged. The petitioners should not be allowed to use the process of this Honorable Court to correct their errors in strategy committed by them before and during the trial.

United States v. *Rosenberg*, 200 F. 2d 666, 668, 669.

The defendants allege, as a further reason that the trial court erred in setting the trial date, that the opportunity to obtain witnesses in their behalf might be imperilled. It is significant that on June 4, namely five months after being indicted, petitioners made no such claim. It is further significant that on August 6, almost eight months later, no such claim was advanced by the petitioners. The claim of the petitioners was that they should never be tried. The record shows that fifty-four alibi witnesses appeared for seven of the eight defendants. The remaining defendant made no claim that any necessary witnesses in

his behalf were unavailable. The authorities cited by the petitioners on this point do not support their contention

III.

The petitioners' allegation that the failure of the trial judge to continue the case *sua sponte* constituted error appeared for the first time in their brief filed in the Supreme Judicial Court, more than two and a half years after the trial date was set.

United States ex rel. Darcy v. *Handy*, 351 U.S. 454, 464.

The position they took before trial, the respondent submits, is adequately treated hereinbefore. The record clearly shows that there never could have been a date set for trial to which the defendants would not have objected.

"In substance, theirs was a contention that the period of alleged prejudice to the defendants would outlast the entire time, whatever that might be, during which a trial, properly called speedy, might be had." This sentence appears in the Opinion of the Massachusetts Supreme Judicial Court, 1959 Adv. Sh. 1107, 1117, and in the Petition, p. 117.

An examination of the record shows that the trial judge, whose opinion is entitled to great weight, understood his duty as to setting a trial date and discharged it with fairness to the defendants and to the citizens of the Commonwealth. The trial judge was well aware that since January 17, 1950, there had been a public realization that a robbery of extraordinary notoriety had remained unsolved.

The careful planning of the robbery, the boldness of its commission and the record amount stolen could not fail to arouse general interest and to stimulate the channels of

public information. Public apathy could hardly be expected.

Defense counsel in their argument to the jury described it "as the biggest armed robbery of the country" (Petition, p. 117).

The publicity stimulated following the commission of the crime took place six years before the prosecution had any official connection with the case. The trial judge in his discretion could reasonably have concluded that the effects of the publicity during January and February had abated or would abate by the date set for trial (August 6th), particularly with the care he would take and did take, as hereinafter will appear in selecting the trial jury.

United States v. *Keegan,* 141 F. 2d 248, 258 (2d Cir.).

United States v. *Leviton,* 193 F. 2d 848, 857 (2d Cir.).

The record shows no abuse of discretion in selecting August 6, 1956, as the trial date.

Commonwealth v. *Millen,* 289 Mass. 441, 463-464.

Commonwealth v. *Bonomi,* 335 Mass. 327, 333.

63 Harv. L. Rev. 840, 846-848.

This Court is asked to read the newspaper reports and say that an atmosphere was created that infected the jury and deprived petitioners of a fair trial. Not one affidavit is presented to sustain this charge.

The record shows that eight prospective jurors, when questioned, answered that in their opinion the defendants were not guilty, and fifty-odd jurors indicated that they could not be fair to the Commonwealth, because of their

relationship or friendship to one or more of the defendants or members of their families. For example, see examination of the first veniremen called (Tr. 338). References in support of this will be found on pages 437, 675, 910, 1002, 1034, 1407 and 1557 of the Transcript and in the examinations of fifty-one other veniremen.

In support of the judge's ruling setting the trial date, the record shows that the case was conducted in a calm, judicial manner. There were no outbursts, disturbances or untoward incidents occurring in the courtroom or elsewhere in the county or in the Commonwealth of Massachusetts.

There was no evidence of hostility shown toward the defendants. On the contrary, defendants through their counsel were given every opportunity to prepare and present their case.

> *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 457, 463.

On August 6, 1956, the defendants emphatically demanded that they be discharged and never tried for these offenses. A claim of denial of due process can hardly be predicated upon the failure of a defense move.

> *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561, 568.

The insistent refusal by the defendants to pursue the remedies available under Massachusetts criminal procedure, namely to seek a change of venue or a continuance, should not now, because of their disappointment, be used as a weapon to reverse a disappointing result after a fair and just trial.

> *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281.

IV.

The respondent submits that there was no error by the trial judge in conducting the examination of prospective jurors or in their selection. The record shows the meticulous and sedulous care exercised by the court in conducting the examination. The transcript is replete with examples of the court's patient recognition and protection of the fundamental rights of all parties in regard to the selection of the jury, a process which consumed over sixteen trial days—August 7 to August 29, 1956.

The trial judge patiently examined 1104 veniremen in open court, even though defense counsels' preconceived plan, to challenge all jurors until their 262 challenges were exhausted, was apparent to him. The trial judge's patient and careful examination covers more than 1500 pages in the typewritten transcript of the trial.

The statement on page 77 of the defendants' petition that the Commonwealth was content with all veniremen declared indifferent, until all the petitioners' 262 peremptory challenges were exhausted, is a distortion of the record. The records show that the Commonwealth was not content with all the veniremen called, but in fact challenged 85 veniremen who had been declared indifferent, before the defendants exhausted their challenges. Thereafter the Commonwealth peremptorily challenged 78 veniremen, who also had been declared indifferent, before the final panel was chosen.

The petitioners' complaint appears to be that the judge should have abdicated his duty. Of every prospective juror called, the judge asked the four questions prescribed by Mass. G.L. (Ter. Ed.) c. 234, sec. 28, which reads:

> ". . . the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn

whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein . . ."

Other questions were asked which, in one instance after another, the judge deemed appropriate. Occasionally, but not always, he put questions suggested by the defendants.

This procedure under the statute having been followed, and no actual bias having been shown to exist, no question of due process is presented to this Court.

Buchalter v. *New York*, 319 U.S. 427, 430.

The defendants take the position that the judge should surrender the direction of the examination to defense counsel even though they repeatedly asserted that no unbiased juror could be found.

The denial of the "Motion for Questions to Jurors" and the refusal to put other questions to the extent that they were refused were within the discretion of the judge.

Commonwealth v. *Trefethen*, 157 Mass. 180, 195, 196.

Commonwealth v. *Phelps*, 209 Mass. 396, 414-415.

Commonwealth v. *Snyder*, 282 Mass. 401, 411.

Commonwealth v. *Bonomi*, 335 Mass. 327, 333-335.

The trial judge spent many hours asking questions, which must have numbered up into the thousands.

"The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with

its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Snyder v. *Massachusetts*, 291 U.S. 97, 105.

The trial court's ruling that a juror is qualified should not be set aside on review except in a clear case. The affirmative of the issue is upon the challenger.

Reynolds v. *United States*, 98 U.S. 145, 155-157.

Nowhere during the course of the trial or upon appeal to the Massachusetts Supreme Judicial Court have the defendants shown that any juror was in fact prejudiced or biased. As this Court has held: ". . . it is not asking too much [to hold] that the burden of showing essential unfairness be sustained by him who claims [it,] . . . not as a matter of speculation but as a demonstrable reality."

Adams v. *United States ex rel. McCann*, 317 U.S. 269, 281.

Reference to the opinion of the Massachusetts Supreme Judicial Court in this case as set out in petitioners' brief, pages 122, 123, 124, will reveal the typical fairness and carefulness with which the trial judge conducted the examination of jurors.

Conclusion.

The petitioners were tried in a Commonwealth which assiduously surrounds one accused of crime with every safeguard to his legal right.

The defendants' trial has been full and fair according to the law of the Commonwealth, and they have been accorded due process of the law in every particular.

Wherefore the respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. McCORMACK, JR.,
Attorney General of the
Commonwealth of Massachusetts,

GARRETT H. BYRNE,
District Attorney, Suffolk District,

JOHN F. McAULIFFE,
Special Assistant Attorney General,
Assistant District Attorney,

GEORGE F. HURLEY,
Special Assistant Attorney General,
Attorneys for Respondent.